SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 559

THE UNITED STATES, PETITIONER,

vs.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, AND SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

INDEX

	Original	Print
Record from the United States Court of Claims in The Western Pacific Railroad Company v. The United States, No. 42-54	1	1
Petition	1	1
Schedule "A"—Chart relating to shipments involved	5	2
Statement of facts for admission under rule prescribing procedure in railroad cases	7	3
Schedule "A"—Chart relating to shipments involved (copy) (omitted in printing)	9	
Answer	10	4
Defendant's response to plaintiff's statement of facts for admission and plaintiff's Schedule A under rule effective April 1, 1953, prescribing procedure in common carrier cases	12	4
Memorandum re pretrial conference	13	5
Plaintiff's motion for judgment on the pleadings, or for summary judgment under Rule 51	15	6
Affidavits attached to brief in opposition to plaintiff's motion for judgment on the pleadings or for summary judgment	18	8
Exhibit 1—Affidavit of Bernard F. Fay	18	8

	Original	Print
Record from the United States Court of Claims in The Western Pacific Railroad Company v. The United States, No. 32-54—Continued		
Affidavits attached to brief in opposition to plaintiff's motion for judgment on the pleadings or for summary judgment—Continued		
Exhibits—Continued		
Exhibit 2—Affidavit of Dr. Leo Finkelstein	20	9
Exhibit 3—Affidavit of Dr. Homer W. Carhart	23	11
Exhibit 4—Affidavit of Dr. Sidney Magram	25	12
Exhibit 5—Affidavit of John A. McConnell	27	14
Exhibit 6—Affidavit of Russell B. Amick	29	15
Exhibit 7—Affidavit of A. S. Dolch	32	16
Exhibit 8—Affidavit of T. C. George	37	19
Exhibit 9—Affidavit of William Levenstein	41	21
Record from the United States Court of Claims in Bangor and Aroostook Railroad Company v. The United States, No. 104-54	43	23
Petition	43	23
Exhibit "A"—Statement showing amounts due Bangor & Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs	46	25
Statement of facts for admission under rule prescribing procedure in railroad cases	62	43
Exhibit "A"—Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs (copy) (omitted in printing)	63	
Defendant's response to plaintiff's statement of facts for admission and plaintiff's schedule A under rule effective April 1, 1953 prescribing procedure in common carrier cases	81	44
Schedule "A"—Tabulation setting forth computations and authorities where exception is taken to computations on Plaintiff's Exhibit "A"	83	45
Schedule "B"—Summary of tabulation	88	50
Answer	89	51
Plaintiff's motion for judgment on the pleadings or for summary judgment under Rule 51	92	52
Record from the United States Court of Claims in Seaboard Air Line Railroad Company v. The United States, No. 250-54	96	54
Petition	96	54
Statement of facts for admission under order of March 11, 1953 prescribing procedure in railroad cases	100	56

	Original	Print
Record from the United States Court of Claims in Seaboard Air Line Railroad Company v. The United States, No. 250-54—Continued		
Statement of facts for admission under order of March 11, 1953 prescribing procedure in railroad cases—Continued		
Schedule "A"—Statement showing amounts due Seaboard Air Line Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs	102	57
Schedule "B"—Statement showing amounts due Seaboard Air Line Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs	103	58
Defendant's response to plaintiff's statement of facts for admission and plaintiff's Schedule A under rule effective April 1, 1953, prescribing procedure in common carrier cases	107	63
Schedule "A"—Tabulation setting forth computations and authorities where exception is taken to computations on Plaintiff's Exhibits A and B	108	65
Schedule "B"—Tabulation setting forth computations and authorities where exception is taken to computations on Plaintiff's Exhibits A and B	110	67
Answer	112	69
Plaintiff's motion for judgment on the pleadings or for summary judgment under Rule 51	114	70
Affidavits attached to brief in opposition to plaintiff's motion for judgment on the pleadings or for summary judgment	117	72
Affidavit of Sidney Katz	118	72
Affidavit of John A. McConnell	119	73
Argument and submission of cases	122	74
Supplemental affidavits attached to brief in opposition to plaintiff's motion for judgment on the pleadings or for summary judgment	123	75
Affidavit of Walter H. Bauer	124	75
Affidavit of Dr. Robert W. Van Dolah	130	78
Affidavit of J. D. Sherson	132	79
Affidavit of Jack A. Dorland	134	81
Affidavit of Charles H. Uecker	136	82
Opinion on plaintiff's motions for judgment on the pleadings or for summary judgment, Laramore, J.	139	84
Dissenting opinion, Madden, J.	141	86
Proceedings following opinion of the Court	143	87
Order re judgment No. 104-54	144	87
Order re judgment No. 250-54	145	88
Clerk's certificate (omitted in printing)	146	
Order granting certiorari	148	89

1 In the United States Court of Claims

No. 42-54

THE WESTERN PACIFIC RAILROAD COMPANY

v.

THE UNITED STATES

PETITION—Filed January 29, 1954

To the Honorable Chief Judge and Associate Judges of the United States Court of Claims:

The plaintiff, The Western Pacific Railroad Company, respectfully represents:

1. Plaintiff is a corporation organized and existing under the laws of the State of California and is a common carrier by railroad in interstate commerce over its own lines and jointly with other carriers.

2 2. From 1947 to 1950, inclusive, plaintiff performed transportation services for the defendant, over its own lines and jointly with other carriers whose lines connect with the plaintiff's lines, by carrying a number of shipments of articles described as incendiary bombs or gas bombs.

3. For the transportation services rendered, the charges claimed by the plaintiff are on the basis of classification of the articles shipped as Bombs, Incendiary, pursuant to Item 1820 of the Consolidated Freight Clasification No. 17, and the rates applicable thereto. The settlements made by the General Accounting Office are on the basis of lower rates made under Rule 18 of Consolidated Freight Classification No. 17. Further details of the said shipments, with references to the bills of lading, dates of shipments, plaintiff's bill numbers, the transportation charges billed and paid, are shown in the attached statement, Schedule A, which is made part hereof.

4. Plaintiff avers that the correct and lawful transportation charges on the said shipments are as stated in Schedule A hereto, that the defendant has refused and failed to pay the correct and lawful charges as stated, and that there is due and owing plaintiff from the United States a balance of $17,710.28.

5. Plaintiff further avers that no action or suit has been commenced or is pending in any other court on account of this claim; that no action has been had thereon in Congress or by any of the executive departments or agencies other than as herein stated;

that plaintiff is the owner of the claim herein stated and that no assignment or transfer of the whole or any part thereof or any interest therein has been made.

3-4 WHEREFORE, plaintiff prays judgment against the defendant in the sum of $17,710.28.

THE WESTERN PACIFIC RAILROAD COMPANY,
By LAWRENCE CAKE,
Its Attorney.

THE WESTERN PACIFIC RAILROAD COMPANY,
526 Mission Street,
San Francisco 5, California.

LAWRENCE CAKE,
1001 Connecticut Avenue,
Washington 6, D. C.,
Attorney of Record.

Here follows Schedule A, fol. 5-6

BILL NUMBER	GOV'T B/L NO.	DATE OF SHIPMENT	POINT OF ORIGIN	DESTINATION	COMMODITY DESCRIPTION INCLUDING PACKING	CAR NO. & INIT.	WEIGHT	RATE	LAND GRT. & SEC.	ACCRUED FREIGHT CHARGES	AMOUNT PAID ORIGINALLY	DEVIATION PENALTY	REFUNDS BY CARRIER	DEDUCTIONS BY GOV'T BILL	DEDUCTIONS BY GOV'T AMOUNT	NET AMOUNT PAID	BALANCE DUE	TARIFF REFERENCE AND ITEM OR SPECIAL RATE AUTHORITY	GOV'T REFERENCE	BASIS FOR CLAIM
P- 51356-A	W 7774545	12-11-37	Clover, Utah	Vandover, Utah	500 Ton Incendiary Bombs, filled with Napalm, without fuse or booster	GP 75245	60000	1.27		1905.90	756.36	38.10		P- 54286	38.10	756.36	739.20	Item 1353, GFA-17, Ist SP 7000 to W., WTB 13-J Depot.	W 178858	See NOTE below
	7774546	12-11-37	Same	Same	750 Ton Same	PFE 38139	60000	1.27		1905.90	768.42	38.21		P- 54286	38.21	768.42	705.36	Same	W 178858	See NOTE below
P- 51358-A	W 7774550	1-23-38	Clover, Utah	Vandover, Utah	500 Ton Same	NYKX 13487	60000	1.27		1905.90	831.30					831.30	868.32	Item 1353, GFA-17, Ist SP 7000 to W., WTB 13-J Depot.	W 178859	See NOTE below
	7774551	1-23-38	Same	Same	750 Ton Same	PFE 38139	60000	1.27		1905.90	846.36					846.36	824.26	Same	W 178859	See NOTE below
P- 51356-A	W 7774573	3-13-38	Clover, Utah	Vandover, Utah	500 Ton Same	PFE 11378	60000	1.27		1905.90	757.20					757.20	757.26	Item 1353, GFA-17, SP 7000 to W., WTB 13-J Depot.	W 178860	See NOTE below
	7774574	3-13-38	Same	Same	500 Ton Same	SP 13855	60000	1.27		1905.90	757.20					757.20	757.26	Same	W 178860	See NOTE below
P- 54290-A	W 7177552	7-31-39	Salida R/A Denver, Colo.	Pinedale, Calif.	250 Ton Aerial Bombs Empty (Bomb, Incendiary, M, 500-lb., AN-M47A2, Less Fins, Exterior & Wire Sealed) Charged with Napalm.	SFF 31577	71680	5.16		3703.37	1211.35					1211.35	2491.82	45% of 1st Class (97.13) to Item 1 94.07 45% of 1st Class (760) Layout : 2.52 Total 96.59 All Items in Carloads 30-L, WTB 39-E, WTB 198.	W 180194	See NOTE below
	7177553	8- 1-39	Same	Same	500 Ton Same	SP 25444	59320	5.16		3062.40	1214.59					1214.59	1276.86	Same	W 180194	See NOTE below
	7177554	7-31-39	Same	Same	450 Ton Same	SFRD 10750	71680	5.16		3703.17	1211.35					1211.35	2491.82	Same	W 180194	See NOTE below
	7177555	7-31-39	Same	Same	450 Ton Same	NYP 47114	77156	5.16		3982.95	1748.39					1748.39	2052.56	Same	W 180194	See NOTE below
	7177556	7-31-39	Same	Same	450 Ton Same	PFE 13458	70000	5.16		3723.60	1191.99					1191.99	2531.61	Same	W 180194	See NOTE below
	7177557	8- 1-39	Same	Same	450 Ton Same	SP 5958	59920	5.16		3021.02	1214.59					1214.59	1806.43	Same	W 180194	See NOTE below
	7177558	8- 1-39	Same	Same	450 Ton Same	SP 5986	59680	5.16		3009.90	1214.59					1214.59	1795.31	Same	W 180194	See NOTE below
																[illegible]	37710.58			

NOTE: The Government contends that Rule 32 of Consolidated Freight Classification No. 17 should be applied (the Combination Articles rule). On this basis, the Government contends that Incendiary Bombs, filled with napalm, without fuse or booster, should be rated at FIFTH Class, because Bombs are so rated in Item 1295 of CFC 17, and Napalm is to be rated in Item 54020 of CFC 17 (Resin, NOIBN, Other than Liquid). The carrier contends that this commodity is rateable at First Class under Item 1220 of CFC 17, "Ammunition, Incendiary, Bombs or Mines," or, where it is applicable, at 45% of 1st Class under provision of 4th Section 22 Carloads 30-L.

Schedule A to Petition

7 [File endorsement omitted]

In the United States Court of Claims

No. 42-54

[Title omitted]

STATEMENT OF FACTS FOR ADMISSION UNDER RULE PRESCRIBING PROCEDURE IN RAILROAD CASES—Filed February 25, 1954

1. The plaintiff, a corporation of the State of California, is a common carrier by railroad over its own lines and jointly with other common carriers by railroad.

2. In 1947 and 1950, the plaintiff as the final and delivering carrier performed transportation service for the defendant, from various points of origin in the United States to destination points on plaintiff's lines, as shown in the attached Schedule A. Freight charges on the said shipments were billed by the plaintiff and were originally paid by the defendant's disbursing officers, in accordance with Section 66, Title 49, U. S. Code, and were subsequently audited by the General Accounting Office. In some instances adjustments were made by deductions from other bills due the plaintiff or by refunds made by the plaintiff at the demand of the General Accounting Office.

3. On each of the shipments in question, the applicable freight charges, on the basis of the Court's decision in Union Pacific Railroad Company v. United States, No. 49505, on April 7, 1953, the amount paid originally, the amount of any supplemental payments made by the defendant, the amount of any refunds made by the plaintiff, the deductions made by the defendant from other
8 bills due the plaintiff, the net amount paid, and the balance due on the basis of the applicable published rates or other rate authority cited, are shown in the attached Schedule A.

4. In all instances where refunds were made by the plaintiff or deductions were made by the defendant from other bills due the plaintiff, the said refunds or deductions were made within 6 years prior to January 29, 1954. In all instances where the amounts paid are shown to be less than the applicable charges, the service was performed within 6 years prior to January 29, 1954.

LAWRENCE CAKE,
Attorney for Plaintiff.

9 SCHEDULE "A" TO STATEMENT

Omitted. Printed side page 5 ante.

10 In the United States Court of Claims

[Title omitted]

DEFENDANT'S ANSWER—Filed May 28, 1954

The defendant, for answer to plaintiff's petition, states as follows:

1. Defendant admits the allegations contained in paragraphs 1 and 2 of plaintiff's petition.

2. Defendant admits the allegations contained in paragraph 3 of plaintiff's petition, except as to the charges listed in plaintiff's Schedule A under plaintiff's bill No. F-46030-A. As to the latter bill on which plaintiff claims charges based on the rate of $5.16 per 100 pounds, defendant avers that the rate should read "$5.14 per 100 pounds."

3. Defendant denies the allegations contained in paragraph 4 of plaintiff's petition.

11 4. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 5 of plaintiff's petition.

WHEREFORE, defendant asks that the petition herein be dismissed with all costs taxed against the plaintiff.

WARREN E. BURGER,
Assistant Attorney General,
Civil Division.

GORDON F. HARRISON,
Attorney, Civil Division,
Department of Justice.

12 DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS FOR ADMISSION AND PLAINTIFF'S SCHEDULE A UNDER RULE EFFECTIVE APRIL 1, 1953, PRESCRIBING PROCEDURE IN COMMON CARRIER CASES

1. Admits.

2. Admits, except that the phrase "in 1947 and 1950" should read "in 1947, 1948 and 1950."

3. Admits, except that Schedule A is inaccurate in listing $5.16

per 100 pounds as the rate for shipments under plaintiff's bill No. F-46030-A. The correct figure is $5.14 per 100 pounds.

4. Admits.

WARREN E. BURGER,
Assistant Attorney General,
Civil Division.

GORDON F. HARRISON,
Attorney, Civil Division,
Department of Justice.

13 In the United States Court of Claims

[Title omitted]

MEMORANDUM RE PRETRIAL CONFERENCE— November 10, 1954

The parties, met pursuant to notice of the Commissioner, in the Commissioner's office, United States Court of Claims, Court of Claims, Washington, D. C., on November 10, 1954.

Present:

Hon. Roald A. Hogenson, Commissioner;
Mr. Lawrence Cake for the plaintiff;
Mr. Gordon Harrison for the defendant;
Mr. E. Craig Kennedy, Attorney, General Counsel's Office, General Accounting, and
Mr. Russell B. Amick, Transportation Specialist, General Accounting Office.

The parties agreed upon the following facts:

1. The plaintiff, a corporation of the State of California, is a common carrier by railroad over its own lines and jointly with other common carriers.

2. In 1947, 1948 and 1950, the plaintiff performed transportation service for the defendant over its own lines and jointly with other carriers whose lines connect with the plaintiff's lines, by carrying a number of shipments of articles described as incendiary bombs without fuzes and bursters, being like the articles transported in the *Union Pacific* case No. 49505, previously decided by this Court on April 7, 1953.

14 3. For the said service performed in 1948 and 1950, covered by plaintiff's bills F-41520, F-42516 and F-46030, the transportation charges claimed by the plaintiff are on the basis of classification of the articles shipped as incendiary bombs pursuant to Item 1820 of Consolidated Freight Classification No. 17, and the rates applicable thereto. The transportation charges

paid by the defendant on the said bills are on the basis of classification of the articles shipped as combination articles under Rule 18 of Consolidated Freight Classification No. 17 and the rates applicable thereto. The difference between the charges claimed by the plaintiff and the charges paid by the defendant, as reported by the General Accounting Office and on the basis of the court's decision in the *Union Pacific* case No. 49505, is $14,280.06.

4. No action or suit has been commenced or is pending in any other court on account of this claim; no action has been had thereon in Congress or by any of the executive departments or agencies other than as herein stated; the plaintiff is the owner of the claim herein stated and no assignment or transfer of the whole or any part thereof or any interest therein has been made.

ROALD A. HOGENSON,
Commissioner.

November 10, 1954.

15 In the United States Court of Claims

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR FOR SUMMARY JUDGMENT UNDER RULE 51—Filed November 17, 1954

The plaintiff moves for judgment on the pleadings, or for summary judgment on the ground that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law.

On February 25, 1954, the plaintiff filed a statement of facts for admission and accompanying schedule in compliance with the court's order of March 11, 1953.

On May 28, 1954, the defendant filed an answer to the petition and a response to the plaintiff's statement of facts for admission.

16 On November 10, 1954, a pre-trial conference was held with Commissioner Hogenson and a pre-trial memorandum was filed, as follows:

"The parties agreed upon the following facts:

"1. The plaintiff, a corporation of the State of California, is a common carrier by railroad over its own lines and jointly with other common carriers.

"2. In 1947, 1948 and 1950, the plaintiff performed transportation service for the defendant over its own lines and jointly with other carriers whose lines connect with the plain-

tiff's lines, by carrying a number of shipments of articles described as incendiary bombs without fuzes and bursters being like the articles transported in the *Union Pacific* case No. 49505, previously decided by this Court on April 7, 1953.

"3. For the said service performed in 1948 and 1950, covered by plaintiff's bills F-41520, F-42516 and F-46030, the transportation charges claimed by the plaintiff are on the basis of classification of the articles shipped as incendiary bombs pursuant to Item 1820 of Consolidated Freight Classification No. 17, and the rates applicable thereto. The transportation charges paid by the defendant on the said bills are on the basis of classification of the articles shipped as combination articles under Rule 18 of Consolidated Freight Classification No. 17 and the rates applicable thereto. The difference between the charges claimed by the plaintiff and the charges paid by the defendant, as reported by the General Accounting Office and on the basis of the court's decision in the *Union Pacific* case No. 49505, is $14,280.06.

"4. No action or suit has been commenced or is pending in any other court on account of this claim: no action has been had thereon in Congress or by any of the executive departments or agencies other than as herein stated; the plaintiff is the owner of the claim herein stated; and no assignment or transfer of the whole or any part thereof or any interest therein has been made."

17

1. The pre-trial memorandum shows that the facts and issue in this case are identical with the facts and issue in *Union Pacific R. Co.* v. *United States,* No. 49505, decided on April 7, 1953, 125 C. Cls. 390. The plaintiff is entitled to summary judgment as a matter of law, on the authority of the decision in the *Union Pacific* case, for $14,280.06.

2. The facts alleged in the petition and admitted by the defendant's answer are substantially the same as the facts set out in the pre-trial memorandum. The only difference is in the amount claimed in the petition and the amount conceded to be due the plaintiff on the basis of the court's decision in the *Union Pacific* case. The latter is $14,280.06 as stated in the pre-trial memorandum. The plaintiff therefore is entitled to judgment as a matter of law, on the pleadings, for $14,280.06.

LAWRENCE CAKE,
Attorney for Plaintiff.

* * * * * * *

18

Affidavits Attached to Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings or for Summary Judgment —Filed February 4, 1955

EXHIBIT 1

In the United States Court of Claims

THE WESTERN PACIFIC RAILROAD COMPANY, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

State of Maryland,
County of Harford:

BERNARD F. FAY being duly sworn deposes and says:

I am a Chemical Engineer employed in the Chemical Corps, Chemical and Radiological Laboratories located at Army Chemical Center, Maryland. My duties include the testing, research and development of flammable substance to be used in flame throwers and fire bombs.

I graduated from the Rice Institute in Texas as a Chemical Engineer in 1925 and for the past 30 years have practiced my profession specializing in explosives, combustion and metallurgy. For the past 4 years I have been employed in the Chemical and Radiological Laboratories of the Army Chemical Corps and served in the Army for 4 years during the war as an engineer in the chemical warfare service.

I am wholly familiar with the mechanics, operation and composition of the "Bomb, Incendiary AN-M47A2 and AN-M47A3" both of which when fully assembled are popularly known
19 as 100 lb. Napalm bombs. In my work I have fully tested the substance with which these bombs are filled known as Napalm Gel and with which I am advised the bomb bodies shipped herein were filled.

Napalm Gel is nothing more than gasoline solidified by the addition of aluminum soap thickener. Upon due consideration it is my opinion that the Napalm Gel assumes incendiary qualities only when contained and as a part of a completed bomb which includes a burster and fuze. Napalm Gel contained in a bomb body to which the burster and fuze have not yet been added is an inflammable substance in that state and is not incendiary. The description of the bomb as incendiary used in the Army technical manuals denotes the eventual use to which the completed

bomb will be put and is not descriptive of a steel bomb body filled with Napalm Gels alone. A bomb capable of functioning as such does not actually become a bomb until all the component parts thereof have been assembled. A bomb body filled with Napalm Gel and having no other parts of the completed bomb added thereto actually is nothing more than a container for the Napalm Gel within and, in fact, presents considerable less hazard in transit, from a transportation viewpoint, than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline.

Substances transported commercially which present the same or greater hazard during shipment and which in containers are analogous to Napalm Gel contained in a steel bomb body
20 are oil based paints in cans, sterno in cans, printers ink in drums, rubber cement in cans or drums, greases in drums and other similar inflammable substances in containers. As a matter of fact any of the items mentioned above could function with almost equal effectiveness as a substitute in Napalm Gel in the completed incendiary bomb. Moreover the attachment of a burster and fuze to a drum or can of rubber cement would thereby convert it to an incendiary bomb.

BERNARD F. FAY.

Sworn to before me this 31st day of January, 1955.

IDA D. MONTANARY,
Notary Public.

My commission expires 2 May 1955.

EXHIBIT 2

IN THE UNITED STATES COURT OF CLAIMS

THE WESTERN PACIFIC RAILROAD COMPANY, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

STATE OF MARYLAND,
County of Harford:

DR. LEO FINKLESTEIN being duly sworn deposes and says:
I am a Chemical Engineer and Physical Chemist employed in the Chemical Corps, Chemical and Radiological Laboratories
21 located at Army Chemical Center, Maryland. My duties include research in incendiaries and smoke. I am the

Scientific Advisor to the Chief of Chemical Division on incendiaries and smoke, Project Officer on incendiary contracts and Project Engineer in the development of gels used in incendiary bombs.

I received a B.S. in Chemical Engineering at Illinois Institute of Technology in 1914, my Ph. D. in physical chemistry and physics at the University of Chicago in 1921. I was 2nd Lt. in the Chemical Warfare Services, AEF, from 1917 to 1919, a Research Chemist in the Bureau of Mines in 1920 to 1923 and a Research Chemist with the Army Chemical Center from 1924 to the present.

I am wholly familiar with the mechanics, operation and composition of the "Bomb, Incendiary AN-M47A2 and AN-M47A3" both of which when fully assembled are popularly known as 100 lb. Napalm bombs. In my work I have fully tested the substance with which these bombs are filled known as Napalm Gel and with which I am advised the bomb bodies shipped herein were filled.

Napalm Gel is nothing more than gasoline solidified by the addition of aluminum soap thickener. Upon due consideration it is my opinion that the Napalm Gel assumes incendiary qualities only when contained and as a part of a completed bomb which includes a burster and fuze. Napalm Gel contained in a bomb body to which the burster and fuze have not yet been added is an inflammable substance in that state and is not incendiary.

22 The description of the bomb as incendiary used in the Army technical manuals denotes the eventual use to which the completed bomb will be put and is not descriptive of a steel bomb body filled with Napalm Gels alone. A bomb capable of functioning as such does not actually become a bomb until all the component parts thereof have been assembled. A bomb body filled with Napalm Gel and having no other parts of the completed bomb added thereto actually is nothing more than a container for the Napalm Gel within and, in fact, presents considerably less hazard in transit, from a transportation viewpoint than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is solid in substance and will not burn as readily.

The more important part of the completed incendiary bomb which enables the bomb to function as such is the burster which contains an explosive (tetroyl) and igniter with the Napalm Gel and it is the combination of these which is the actual incendiary element of the bomb. From the pointed view and expenses of construction the burster and fuze to my knowledge comprises more than 75% of the cost of the completed bomb whereas the

gel and the steel bomb body comprise less than 25% of the cost thereof.

A comparison can be made in the case of the "smoke" bomb which does not contain smoke but only a mixture which produces smoke when ignited by a suitable fuze and igniter, with incendiary which contains an inflammable mixture of gasoline and aluminum soap which does not function as an incendiary
23 until exploded and ignited. The term either smoke or incendiary is only used to identify the tactical use of the completed bomb.

DR. LEO FINKELSTEIN.

Sworn to before me this 28 day of January 1955.

IDA D. MONTANARY,
Notary Public.

My commission expires 2 May 1955.

EXHIBIT 3

UNITED STATES COURT OF CLAIMS

No. 42-54

THE WESTERN PACIFIC RAILROAD COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

WASHINGTON,
District of Columbia, ss:

I, DR. HOMER W. CARHART, being duly sworn on oath, depose and say:

I. That I am the Head, Fuels Branch, Chemistry Division, Naval Research Laboratory, in the District of Columbia; that I received the degree of Doctor of Philosophy in Organic Chemistry from the Maryland University in 1939.

II. That, among my other official duties, I am charged with the direction of research on petroleum and rocket fuels.
24 III. That I am familiar with thickened gasoline, having worked in connection therewith during World War II in certain projects submitted by the Navy Department.

IV. Napalm gel consists of gasoline and a solidifying agent, aluminum stearate, which is added to the gasoline for the pur-

pose of creating an adhesive mass capable of destroying property by fire when properly activated.

V. Napalm gel itself is not incendiary, since it is not capable of spontaneous combustion and must be activated by use of a pyrotechnic material, such as white phosphorus, before it assumes any incendiary characteristics.

VI. That, with respect to incendiary characteristics, Napalm gel is not different from rubber cement which is also used as a component of incendiary bombs but which itself is not incendiary.

VII. That the white phosphorus charge used in an incendiary bomb when said bomb is in its final form and suitable for its intended purpose is the incendiary which, as such, is capable of self-ignition and ignites the Napalm or similar gel that is contained in the completed bomb.

VIII. That a container of Napalm gel is not handled differently from a container of ordinary gasoline and is not considered any more incendiary than is ordinary gasoline.

HOMER W. CARHART.

Subscribed and sworn to before me, by the affiant above named, this 1st day of February 1955.

DOROTHY R. NIEMAN,
25 *Notary Public.*

EXHIBIT 4

IN THE UNITED STATES COURT OF CLAIMS

THE WESTERN PACIFIC RAILROAD COMPANY, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

STATE OF MARYLAND,
County of Harford:

DR. SIDNEY MAGRAM being duly sworn deposes and says:

I have been employed as a Chemical Engineer and a Physical Chemist in the Chemical Corps, Chemical and Radiological Laboratories located at Army Chemical Center, Maryland since July of 1940. I am Branch Chief of the Incendiary and Aerosol Branch which negotiates in research and development of incendiary pyrotechnics and smokes. I received my B. S. at the University of Pittsburgh in 1937 and my Ph. D. at New York University in 1941.

I am wholly familiar with the mechanics, operations and composition of the "Bomb, Incendiary AN-M47A2 and AN-M47A3"

both of which when fully assembled are popularly known as 100 lb. Napalm bombs. In my work I have fully tested the substance with which these bombs are filled known as Napalm Gel and with which I am advised the bomb bodies shipped herein were filled.

26 Napalm Gel is nothing more than gasoline solidified by the addition of aluminum soap thickener. Upon due consideration it is my opinion that the Napalm Gel assumes incendiary qualities only when contained and as a part of a completed bomb which includes a burster and fuze. Napalm Gel contained in a bomb body to which the burster and fuze have not yet been added is an inflammable substance in that state and is not incendiary. The description of the bomb as incendiary used in the Army technical manuals denotes the eventual use to which the completed bomb will be put and is not descriptive of a steel bomb body filled with Napalm Gels alone. A bomb capable of functioning as such does not actually become a bomb until all the component parts thereof have been assembled. A bomb body filled with Napalm Gel and having no other parts of the completed bomb added thereto actually is nothing more than a container for the Napalm Gel within and, in fact, presents considerable less hazard in transit, from a transportation viewpoint, than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline.

Substances transported commercially which present the same or greater hazard during shipment and which in containers are analogous to Napalm Gel contained in a steel bomb body are oil based paints in cans, sterno in cans, printers ink in drums, rubber cement in cans or drums, greases in drums and other similar inflammable substances in containers. As a matter of fact any of the

27 items mentioned above could function with almost equal effectiveness as a substitute in Napalm Gel in the completed incendiary bomb. Moreover the attachment of a burster and fuze to a drum or can of rubber cement would thereby convert it to an incendiary bomb.

DR. SIDNEY MAGRAM.

Sworn to before me this 31st day of January 1955.

IDA D. MONTANARY,
Notary Public.

My commission expires 2 May 1955.

EXHIBIT 5

STATE OF VIRGINIA,
Countby of Arlington, ss.

AFFIDAVIT

JOHN A. MCCONNELL being first duly sworn on oath deposes and states:

1. That he is employed in the Office of the Chief of Transportation, Freight Traffic Division, Rate Negotiation Branch, Classification Section; that he is Assistant Chief of the Classification Section; which is responsible for handling all matters pertaining to the proper freight classification of all materials shipped by the Department of the Army;

2. That he was employed in the Classification Section at the time Change 3 to SB 55-6, Freight Billing Guide, was published on 12 August 1947 and is familiar with the circumstances
28 which lead up to the publication of that Change; that under Change 3 bomb bodies filled with a gasoline gel (gasoline mixed with Napalm) were properly billed as aerial bombs, empty, and that such conclusion was reached after discussion with and agreement by classification experts employed by the Army and the railroads, and in consideration of the fact that the commodity as shipped, without burster and fuze, was neither incendiary nor explosive.

3. That incendiary bombs complete with boosters and fuzes were actually shipped when assembled in multiple-bomb clusters, were properly classified under item 1820 of Consolidated Freight Classification, and freight charges have been paid on that basis.

JOHN A. MCCONNELL.

Subscribed to and sworn before me this the 2nd day of February 1955.

WALTER E. SCOTT,
Notary Public.

My Commission Expires Mar. 10, 1956.

29

EXHIBIT 6

UNITED STATES COURT OF CLAIMS

No. 42-54

THE WESTERN PACIFIC RAILROAD COMPANY,
PLAINTIFF,

v.

THE UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

WASHINGTON,
District of Columbia, SS.

I, RUSSELL B. AMICK, being duly sworn on oath depose and say:

I. That I am Group Supervisor, Special Reports Section, Transportation Division General Accounting Office.

II. That from 1920 to 1935 I was employed as a freight rate clerk by the Southern Railway and from 1935 until the present time I have been employed by the General Accounting Office in various capacities all dealing with transportation in general and freight classification and rates in particular.

III. That during the period from 1920 to the present time my official duties required among other things the constant use and application of tariffs issued by common carriers or their agents including the tariff commonly referred to as the Consolidated Freight Classification.

30 IV. That I am familiar with Consolidated Freight Classification No. 17, preceding and superseding issues thereof.

V. That I was closely concerned with the audit of transportation accounts involving shipments of steel bomb bodies filled with napalm gel, but shipped without igniters, bursters or fuzes, similar to the articles involved in this suit.

VI. That in my opinion the application of Item 1800 of Consolidated Freight Classification No. 17 is limited by its terms to articles of ammunition which during transportation are either explosive, incendiary or gas, smoke or tear producing, and that, by reason of the reference in that item to Note 1, item 1805, its application also is limited to items of ammunition, etc., which are subject to the rules and regulations published in Agent W. S. Topping's Tariff No. 4, I.C.C. No. 4, and superseding issues thereof.

VII. That neither the referred-to item 1800 nor any of the items published as sub-headings thereunder in said Consolidated Freight Classification No. 17 has any application to articles which during transportation are not ammunition, explosive, incendiary, or gas,

smoke or tear producing or to articles which are not subject to the rules and regulations published in Agent W. S. Topping's I.C.C. No. 4.

VIII. That the provisions of Consolidated Freight Classification No. 17 and the rules and regulations published in Agent W. S. Topping's I.C.C. No. 4 apply to explosives and other articles
31 in the form in which such articles are handled and transported by common carriers In the instant case the addition of the burster, fuze and igniter after delivery at destination did not affect the classification or identity of the article during transportation.

IX. That the articles involved in this suit, having been transported without fuzes, bursters, or igniters, were not subject to the provisions of Agent Topping's Tariff No. 4, and were not fairly embraced within the general caption in item 1800 and are not subject to the ratings named in item 1820 of Classification No. 17.

RUSSELL B. AMICK.

Subscribed and sworn to before me, by the affiant above named, this 2nd day of February 1955.

EDWIN A. BERGER,
Notary Public.

My Commission Expires July 14, 1956.

32 EXHIBIT 7

United States Court of Claims

No. 42-54

WESTERN PACIFIC RAILROAD COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

WASHINGTON,
District of Columbia.

A. S. DOLCH, being duly sworn, deposes and says:

I

My name is A. S. Dolch. I reside in Washington, D. C. and for the past seven years have been employed by the Department of Justice as a Transportation Rate Analyst. My transportation experience covers over fifty years including about six years pre-

vious to my present employment with three other Government agencies, viz: U. S. Department of Agriculture, War Production Board, and Board of Investigation and Research-Transportation.

Immediately preceding my government service, for almost twenty years, I was traffic manager of the Chicago, Attica & Southern Railroad Company. During the 20 years mentioned, by virtue of my office, I was a member of the general rate committee of the Central Freight Association, the rate making organization of the railroads operating in the area north of the Ohio River
33 and east of the Mississippi roughly to the Appalachians or a line known in railroad parlance as "the Buffalo-Pittsburgh Line".

I was traffic manager for commercial concerns at Tulsa, Oklahoma and at St. Louis, Missouri for about three years, and from 1910 to 1920 I was employed in various positions in the commercial office and in the general freight office at St. Louis of the St. Louis-San Francisco Lines, which included the operations of the Chicago and Eastern Illinois Railroad Company prior to 1914.

In connection with my service for the Frisco Lines my duties for over three years involved handling rate adjustment files including correspondence with shippers and other railroads, also docketing rate proposals with the Southwestern Freight Bureau and St. Louis District Committee (during Federal Control)—on occasion. I attended these rate bureau meetings. During this period, I also performed the physical operation of supplementing and reissuing freight tariffs, observing the tariff-making rules of the Interstate Commerce Commission then current.

II

I am familiar with the Consolidated Freight Classification No. 17, preceding and succeeding issues, all of which are filed with the Interstate Commerce Commission: I have inspected some of the bills-of-lading covering certain shipments here involved, have seen the billed description as "empty bombs" and corrections by
34 the railroads that on inspection by some of their Bureau inspectors, it was discovered the metal bombs or bomb bodies were filled with gasoline jelly.

III

In my opinion, item 1820 of Classification No. 17, and the same item and identical reading in classifications 16, 18 and 19, does not apply to the shipments in question for the following reasons:

1. Under proper tariff interpretation, all language in any rate item must be read together; further, according to the makeup of the classification, the principal subject matter to consider here is item 1800, reading *"Ammunition, Explosive, Incendiary or Gas, Smoke or Tear Producing, see Note 1, item 1805:"*—then follows

Note 1 under Item 1805 indented two spaces and the subheads of the different varieties of ammunition (1800) under items 1810 to 1865 inclusive indented one space. According to the Interstate Commerce Commission's rules for tariff publication (their tariff Circular No. 20), this method of printing a general description, with subheadings indented brings all such subheads under the main description.

2. Note 1 under the description in item 1800, *AMMUNITION, Explosive, Incendiary or Gas, Smoke or Tear Producing* says that this item is "subject to Rule 39" (of the Classification) with a minor exception of no consequence here. Rule 39 (p. 144) reads in part:

35 Explosives or other dangerous articles will *only* be handled and transported by:

1. Rail carriers parties to these classifications in accordance with rules and regulations prescribed by the Interstate Commerce Commission as published in Agent H. A. Campbell's Freight Tariff No. 4, I.C.C. No. 4, supplements thereto and reissues thereof. (Paragraphs 2 and 3 omitted as they relate to motor and water carriers.)

If description provided in Bureau of Explosive Tariff, Agent H. A. Campbell's I.C.C. No. 4, supplements thereto and reissues thereof, differs from description contained in Classification, Exception, or commodity tariff, Bureau of Explosives description on shipping orders and bills of lading must be shown first and other descriptions immediately thereafter in parentheses. (Emphasis supplied.)

My emphasis of the word *only* in the first sentence of Rule 39 is to point to the exclusive nature of the rule. Reference to Agent H. A. Campbell's (formerly W. S. Topping's) I.C.C. No. 4 indicates (Part 1, pars. B, F and G, pp. 40-41) that this publication is made pursuant to an Act of Congress and regulations of the Interstate Commerce Commission (their docket 3666) resulting therefrom (18 U.S.C. 835). The tariff, I.C.C. No. 4, provides in Sec. 56 (p. 63) that "material relating to ammunition—such as—sand-loaded bombs, empty projectiles, empty mines, empty bombs,—is exempt from these regulations."

36 II

In view of my experience and in light of the information set forth above, I am convinced that in order for an article to be rated under Item 1800 or any of its specific twelve subdivisions (Items 1810 through 1865) it must be an article which itself is subject to regulation under Topping's Tariff I.C.C. No. 4. These regulations are promulgated by the Interstate Commerce Commission and are published in the Code of Federal Regulations at 49

C.F.R., Parts 71-78. Therefore, it is very clear to me that an empty bomb, a sand-loaded bomb or a bomb shell filled with an inert substance such as jellied gasoline is not included under the reading of the Classification item 1820 as circumscribed by items 1800 and 1805, the three items being restricted and further elaborated by Rule 39 of the Classification and Agent H. A. Campbell's I.C.C. No. 4. I wish further to state that I have carefully searched the listing of "dangerous articles" in tariff I.C.C. 4 and do not find therein the listing of *jellied gasoline*.

A. S. DOLCH.

Subscribed and sworn to before me this 2d day of February, 1955.

MADELINE MACDONALD,
Notary Public, D. C.

My Commission expires Jan. 14, 1956.

37

EXHIBIT 8

In the United States Court of Claims

No. 42-54

THE WESTERN PACIFIC RR CO.

v.

THE UNITED STATES

AFFIDAVIT

T. C. GEORGE being duly sworn, deposes and says:

That I have been employed by the Bureau of Explosives since 1943 and from 1948 to the present have been Assistant Chief Inspector thereof. I make this affidavit in the place and stead and with the full authority of Harry A. Campbell, the Chief Inspector for the Bureau of Explosives. This affidavit and all the facts contained therein are concurred in by Mr. Campbell who has authorized me to make this affidavit by reason of the fact that he is presently attending a conference in Ontario, Canada.

That the Bureau of Explosives is an association consisting of explosives manufacturers, railroads, steamship companies, express companies and others in similarly related industries. The duties of the Bureau are to enforce the regulations of the Interstate Commerce Commission with relation to the transportation of explosives and other dangerous articles and whose finances are administered by the Association of American Railroads.

That my official duties consisted generally of acting as
38 first assistant to the chief inspector of the Bureau in the conduct of experiments, research and instructions to persons connected with the Bureau.

That I have assisted and collaborated with the Chief Inspector in issuing "explosives and other dangerous articles Freight Tariff No. 4, I.C.C. No. 4, as amended" and superseding tariffs setting forth the rules and regulations approved by the Interstate Commerce Commission for the packing, marking, loading and handling of explosives and other dangerous articles.

That in the course of my official duties I have examined component parts or articles involved in this action, including Napalm gel and bomb bodies. I have also examined the fuzes and bursters or igniters which were not shipped with the other component parts of the bombs concerned herewith but which were essential to the proper operation and function of incendiary bombs in their final state.

That I examined the aforementioned component parts in the course of my duties and I examined other articles regarding which questions arise as to whether or not they are properly made or safe for transportation and for the purpose of prescribing the packing requirements and the regulations which would apply to their transportation.

That by letter dated January 26, 1945 signed by Colonel Gillet and Lietenant Colonel Sauls, Chemical Warfare Service, War Department (now Department of the Army) this Bureau was asked to examine the above-described components as to their character and nature.

That by letter dated May 17, 1945 in reply to the afore-
39 mentioned letter this Bureau stated over the signature of Harry A. Campbell, Chief Inspector, the conclusion that the Napalm filling (Napalm Gel) was not described as a dangerous article pursuant to the regulations of the Interstate Commerce Commission but that the fuzes and bursters or igniters were properly identifiable as explosive devices under those regulations.

That in response to inquiries from inspectors of the Bureau of Explosives throughout the country the Bureau informed them in writing that the articles examined in the form shipped—without fuzes, bursters or other mechanisms to open the bomb bodies and ignite the contents—was not a dangerous article or an explosive article.

That the basis for the Bureau's conclusion that the article as shipped did not come within the scope, or within any definition of the aforementioned regulations of the Commission as set forth in the aforementioned tariff No. 4 and superseding tariffs identifying explosives and other dangerous articles.

That by letter dated September 1, 1948 in response to a letter dated August 24, 1948 from the Official Classification Committee, which is primarily a railroad sponsored and maintained body responsible for classifying articles, principally for railroad trans-

portation purposes, the Bureau advised that bombs were shipped in various ways, some with fuzes, some without; that many bomb bodies contained nothing more than gelatinized gasoline; and that if a bomb body did not contain the burster containing the
40 explosive and igniter it was not a hazardous article.

That a bomb body filled with Napalm gel without burster, igniter, or fuze, would not be shipped either as an explosive or as an incendiary bomb.

That articles similar to those concerned herein being bomb bodies filled with Napalm gel without ignition elements, bursting charges, detonating fuzes, or other explosive components, did not fall within the purview of section 59, relating to explosive chemical ammunition of the aforementioned Tariff No. 4, since Napalm was not one of the chemicals or liquids referred to in sections 330, 342 and 364 of that tariff, relating to chemical ammunition.

That bomb bodies filled with Napalm gel but shipped without fuzes, bursters or igniters are not required to be shipped in accordance with the Interstate Commerce Commission regulations governing the shipment of explosives and other dangerous articles.

T. C. GEORGE.

Sworn to before me this 1st day of February, 1955. Mary T. Gilligan, *Notary*.

MARY T. GILLIGAN, Notary Public, State of New York No. 03-6521000. Qualified in Bronx County. Certificates filed in New York County. Commission Expires March 30, 1956.

41

EXHIBIT 9

UNITED STATES COURT OF CLAIMS

No. 42-54

THE WESTERN PACIFIC RAILROAD COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

WASHINGTON,
District of Columbia, ss:

I, WILLIAM LEVENSTEIN, being duly sworn on oath, depose and say:

I. That I am Group Supervisor, Special Reports Section, Transportation Division, General Accounting Office.

II. That my official duties require, among other things, that I assemble the documents involved in cases pending before the various courts of the United States in order to prepare proposed reports to the Department of Justice for use in defense of said suits.

III. That I have examined the bills of lading listed in Schedule A attached to the petition filed in the above-entitled suit.

IV. The description of the commodity shipped under those bills of lading is as follows:

42

Bill No.	Bill of Lading No.	Description
41236	WW-7790525	Aerial Bombs, Empty
	WW-7790526	Aerial Bombs, Empty
41520	WW-7790560	Aerial Bombs, Empty (M47A3)
	WW-7790562	Aerial Bombs, Empty (M47A3)
42516	WW-7790673	Aerial Bombs, Empty (M47A2)
	WW-7790672	Aerial Bombs, Empty (M47A2)
46030	WW-9177035	Aerial Bombs, Empty (Bomb, Incendiary, NP, 100-lb., AN-M47A2, Less Fuse, Burster & Wire Arming)
	WW-9177047	Aerial Bombs, Empty (Bomb, Incendiary, NP, 100-lb., AN-M47A2, Less Fuse, Burster & Wire Arming)
	WW-9177042	Aerial Bombs, Empty (Bomb, Incendiary, NP, 100-lb., AN-M47A2, Less Fuse, Burster & Wire Arming)
	WW-9177026	Aerial Bombs, Empty (Bomb, Incendiary, NP, 100-lb., AN-M47A2, Less Fuse, Burster & Wire Arming)
	WW-9177025	Aerial Bombs, Empty (Bomb, Incendiary, NP, 100-lb., AN-M47A2, Less Fuse, Burster & Wire Arming)
	WW-9177054	Aerial Bombs, Empty (Bomb, Incendiary, NP, 100-lb., AN-M47A2, Less Fuse, Burster & Wire Arming)
	WW-9177046	Aerial Bombs, Empty (Bomb, Incendiary, NP, 100-lb., AN-M47A2, Less Fuse, Burster & Wire Arming)

WILLIAM LEVENSTEIN.

Subscribed and sworn to before me, by the affiant above named, this 2nd day of February, 1955.

DOROTHY R. NEIMAN,
Notary Public.

My Commission Expires August 14, 1956.

43 In the United States Court of Claims

No. 104-54

BANGOR AND AROOSTOOK RAILROAD COMPANY

v.

THE UNITED STATES

PETITION—Filed March 10, 1954

To the Honorable Chief Judge and Associate Judges of the United States Court of Claims:

The plaintiff, Bangor and Aroostook Railroad Company, respectfully represents:

1. Plaintiff is a corporation organized and existing under the laws of the State of Maine and is a common carrier by railroad in interstate commerce over its own lines and jointly with other carriers.

2. In 1944 plaintiff performed transportation services for the defendant, over its own lines and jointly with other carriers whose lines connect with the plaintiff's lines, by carrying a number
44 of shipments of articles described as incendiary bombs, as shown in the attached statement, Exhibit A.

3. For the transportation services rendered, the charges claimed by the plaintiff are on the basis of classification of the articles shipped as Bombs, Incendiary, pursuant to Item 1820 of the Consolidated Freight Classification, and the rates applicable thereto. The settlements made by the General Accounting Office are on the basis of lower rates made under Rule 18 of the Consolidated Freight Classification. Further details of the said shipments, with references to the bills of lading, dates of shipments, plaintiff's bill numbers, the transportation charges billed and paid, are shown in the attached statement, Exhibit A, which is made part hereof.

4. Plaintiff avers that the correct and lawful transportation charges on the said shipments are as stated in Exhibit A hereto, that the defendant has refused and failed to pay the correct and lawful charges as stated, and that there is due and owing plaintiff from the United States a balance of $80,131.96.

5. Plaintiff further avers that no action or suit has been commenced or is pending in any other court on account of this claim; that no action has been had thereon in Congress or by any of the executive departments or agencies other than as herein stated; that plaintiff is the owner of the claim herein stated and that no assign-

ment or transfer of the whole or any part thereof or any interest therein has been made.

45 WHEREFORE, plaintiff prays judgment against the defendant in the sum of $80,131.96.

BANGOR AND AROOSTOOK RAILROAD COMPANY,

By LAWRENCE CAKE,
Its Attorney.

BANGOR AND AROOSTOOCK RAILROOD COMPANY,
Bangor, Maine.

LAWRENCE CAKE,
1001 Connecticut Avenue,
Washington 6, D. C.,
Attorney of Record.

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

Road A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description including Packing	Car No. and Initial	Weight	Rate
7869 (1944)	VT1460953	6-16-44	Eastvillo,Me.	Searsport,Me.	430 Bomb Fireworks,P. 16/727 Bombs W.P.Filled	24816414	696.00	70¢
Do	VT1460965	Do	Do	Do	Do	Bos line 13633h	69700	70¢
Do	VT1460965	Do	Do	Do	660 Bomb Fireworks,P. 16/727 Bombs W.P.Filled	C.P. 889983	55800	70¢
Do	VT1460966	6-17-44	Do	Do	430 Bomb Fireworks,P. 16/727 Bombs W.P.Filled	B&O 876661	69800	70¢
Do	VT1460963	5-25-44	Do	Do	635 Bomb Fireworks,P. 100# Bombs W.P.Filled	2086798	63000	70¢
Do	VT1460967	Do	Do	Do	770 Bomb Fireworks 100# 16/727 Bombs W.P.Filled	24816067	76100	70¢
Do	VT1460956	Do	Do	Do	430 Bomb Fireworks 100# 16/727 Bombs W.P.Filled	6892708	67100	70¢

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originly	Supplemental Payments	Refund by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	1387.32	1387.32			7936 7943 7951 7957 7958 7964	517.80	739.44	517.80	Carlotte 100 A-800 Section 22-Int Carlotte MRC7000-4583 Section 22-Int Carlotte Section 22	T-SECOL-150869-A/44 M. P. Rate	Shipment Consisted of Complete Explosive Incendiary Bombs
	1498.49	1498.49			Do	550 .52	737.97	550.52	Do	Do	Do
	1166.69	1166.69			Do	489.93	656.76	489.93	Do	Do	Do
	1290.54	1290.54			Do	551.39	739.15	551.39	Do	Do	Do
	1301.75	1301.75			Do	553.15	748.10	553.15	Do	Do	Do
	1568.96	1568.96			Do	668.17	900.79	668.17	Do	Do	Do
	1390.56	1390.56			Do	546.95	795.31	546.95	Do	Do	Do
	9158.11	9158.11				3906.39	5251.82	3906.39			

EXHIBIT A to Petition

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

Bond A XX Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description including Packing	Car No. and Initial	Weight	Rate
$2160(1564)	W&A0095	5-13-44	Huron, Ohio	Searsport, Me.	Bombs, Incendiary, Loose 1st Locomotive Matter	B2118.45	97516	1.39
Do	W&A0096	Do	Do	Do	Do	Alton 30712	97516	1.39
Do	W&A0093	Do	Do	Do	Do	WP19550	97516	1.39
Do	W&A0094	Do	Do	Do	Do	Erie 76850	97516	1.39
Do	W&A0095	Do	Do	Do	Do	BRIF 69845	97516	1.39
Do	W&A0097	Do	Do	Do	Do	Erie 70139	97516	1.39
Do	W&A0098	Do	Do	Do	Do	A.T. 77686	97516	1.39
Do	W&A0099	Do	Do	Do	Do	BRI 1215	97516	1.39
Do	W&A0100	Do	Do	Do	Do	ATSF 129550	97516	1.39

Land Grant Percent. Deduction	Reconsignment Freight Charges	Amount Paid Originally	Supplemental Payments	Refunded by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	1257.96	1257.96			1350(5302) 1357-5367 1369-5370 1372 1377-5378 1380-5389 1394-5398 M335(1951)	$95.10	671.86	$95.10	Items 100 240 Section 22-240 Section 15-240 Question 405 of 1st Sup Plus 25% Increase	I.C.C. 26875 4/44 R.R.B.	Shipment Omitted of Complete Explosive Incendiary Bombs
	1257.96	1257.96			Do	$95.10	671.86	$95.10	Do	Do	Do
	1257.96	1257.96			Do	$95.10	671.86	$95.10	Do	Do	Do
	1257.96	1257.96			Do	$95.10	671.86	$95.10	Do	Do	Do
	1257.96	1257.96			Do	$95.10	671.86	$95.10	Do	Do	Do
	1257.96	1257.96			Do	$95.10	671.86	$95.10	Do	Do	Do
	1257.96	1257.96			Do	$95.10	671.86	$95.10	Do	Do	Do
	1257.96	1257.96			Do	$95.10	671.86	$95.10	Do	Do	Do
	1257.96	1257.96			Do	$95.10	671.86	$95.10	Do	Do	Do

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing difference account disputed application of rates on shipments of incendiary bombs

B and A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description including Packing	Car No. and Initial	Weight	Rate
Do	W&.0[illegible]21	5-25-44	Do	Do	Do	PE 68823	97526	1.89
Do	W&.0[illegible]22	Do	Do	Do	Do	PE 120145	97526	1.89
Do	W&.0[illegible]23	Do	Do	Do	Do	GE 47308	97526	1.89
Do	W&.0[illegible]24	Do	Do	Do	Do	PE 45990	97526	1.89
Do	W&.0[illegible]25	Do	Do	Do	Do	ESS 22883	97526	1.89
Do	W&.0[illegible]26	Do	Do	Do	Do	KI 145447	97526	1.89
Do	W&.0[illegible]28	Do	Do	Do	Do	PE 78847	97526	1.89
Do	W&.0[illegible]29	Do	Do	Do	Do	ILAM 48024	97526	1.89
Do	W&.0[illegible]30	Do	Do	Do	Do	GEL 307182	97526	1.89
Do	W&.0[illegible]31	Do	Do	Do	Do	PE 86356	97526	1.89
Do	W&.0[illegible]32	Do	Do	Do	Do	GEM 37917	97526	1.89

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originly	Supplemental Payments	Refunds by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	30
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do
	1257.96	1257.96			Do	585.10	672.86	585.10	Do	Do	Do

27

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

B and A R R Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
Do	#84835	5-15-44	Do	Do	Do	MA4619	77516	1.99
Do	#84836	Do	Do	Do	Do	[illegible]	77516	1.99
Do	#84837	Do	Do	Do	Do	[illegible]	77516	1.99
							[illegible]	[illegible]

Land Grant Percent. Deduction	Reasonable Freight Charges	Amount Paid Originally	Supplemental Payments	Refund by Carrier	Deductions by Gov't Bill Number	Deductions by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	1257.96	1257.96			Do	586.30	671.66	586.30	Do	Do	Do
	1257.96	1257.96			Do	586.30	671.66	586.30	Do	Do	Do
	1257.96	1257.96			Do	586.30	671.66	586.30	Do	Do	Do
	[illegible]	[illegible]				[illegible]	[illegible]	[illegible]			

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

Road A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
7257 (19th)	W6,058,390	6-27-44	Lubec, Me.	Searsport, Me.	816 Demo Fireworks Bombs, Incendiary 20# M1741 E.P.Filled W/O Service Fuse	RTC 777307	$1715	2.98
Do	W6,058,396	Do	Do	Do	Do	RDG 5579	$1715	2.98
Do	W6,058,395	Do	Do	Do	Do	SLSF 241582	$1715	2.98
Do	W6,058,389	6-26-44	Do	Do	Do	RTC 779568	$1715	2.98
Do	W6,058,387	Do	Do	Do	Do	SLSF 241859	$1715	2.98
Do	W6,058,386	Do	Do	Do	Do	SAB 19588	$1715	2.98
Do	W6,058,385	Do	Do	Do	Do	SC 19608	$1715	2.98
Do	W6,058,379	Do	Do	Do	799 Demo Fireworks, Bombs Incendiary 20# M1741 E.P.Filled W/O Service Fuse			
Do	W6,058,378	Do	Do	Do	816 Demo Do	RTC 777775	$1715	2.98
Do	W6,058,376	Do	Do	Do	816 Demo Fireworks	SAB 19586	$1715	2.98

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originly	Supplemental Payments	Refund by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	$8,37.31	$8,37.31			2189 3095 2344 3095	$268.57	1196.74	$268.57	Carlton's 100 A-167 Sec.IV-268	A-240 18,683 A&A R.R.E.	Shipment Consisted of Complete Explosive Incendiary Bombs
Do	$8,37.31	$8,37.31			Do	$268.57	1196.74	$268.57	Do	Do	Do
Do	$8,37.31	$8,37.31			Do	$268.57	1196.74	$268.57	Do	Do	Do
Do	$8,35.11	$8,35.11			Do	$268.57	1199.54	$268.57	Do	Do	Do
Do	$8,35.11	$8,35.11			Do	$268.57	1199.54	$268.57	Do	Do	Do
Do	$8,37.31	$8,37.31			Do	$268.57	1196.74	$268.57	Do	Do	Do
Do	$8,35.11	$8,35.11			Do	$268.57	1199.54	$268.57	Do	Do	Do
Do	$2176.36	$2176.36			Do	$113.16	1061.80	$113.16	Do	Do	Do
Do	$8,39.51	$8,39.51			Do	$268.57	1196.94	$268.57	Do	Do	Do
Do	$8,39.51	$8,39.51			Do	$268.57	1196.94	$268.57	Do	Do	Do

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

B and A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
Do	W6,958,375	6-16-44	Lubec, Calais.	Searsport, Me.	750 Bombs Fireworks Incendiary Bombs 100#	CBQ 213052	77905	2.98
Do	W6,958,397	6-19-44	Lubec, Calais.	Do	810 Bombs Fireworks	MKT 241368	81715	2.98
Do	W6,958,377	6-16-44	Lubec, Calais.	Do	810 Bombs Fireworks Incendiary Bombs 100#	MKT 79808	81715	2.98

Land Grant Percent. Deduction	Reasonable Freight Charges	Amount Paid Originally	Supplemental Payments	Refunded by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	$178.76	$178.76			Do	1113.16	1065.60	1113.16	Do	Do	Do
	857.31	857.31			Do	1858.57	1196.74	1858.57	Do	Do	Do
	857.12	857.12			Do	1858.57	1197.48	1858.57	Do	Do	Do
	$1159.13	$1159.13				1598.59 1812.66 [illegible]	1598.54	1598.59 1812.66 [illegible]			

* Return Weighing & Inspection Bureau Forwarding weight certificate and claim approved by G.A.G. Labor dated 9/11/44 Claim No. 41856

Statement showing amounts due Ranger and Arcadian Railroad Company from the United States representing differences account disputed application of rates on shipments of boundary tanks

Bond & Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description including Packing	Car No. and Initial	Weight	Rate
460 (Bk)	W2536619	1-20-18	Bethel[illegible], Ala.	Hampton, Ala.	810 Steam Fireworks 100#	RTC 33183	81500	2.98
do	W2536619	1-20-18	do	do	810 Steam Fireworks 9 100#	GNJ 15909	81000	2.98

Lead Cross Planned, Detected	Reasonable Freight Charges	Amount Paid Originally	Supplemental Payments	Refund by Carrier	Deduction by Gov't Audit Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Rider or Special Rate Authority	Government File Reference	Basis for Claim
	693.77	693.77							Exclusive 222 1-20 Rate Selection		Shipment Returned as Boundary Tank
	708.45	708.45					330.33	597.45			do

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

B and A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
6453(1946)	WTLF5Mk72	4-29-44	Huntsville, Ala.	Searsport, Me.	750 Bombs Fireworks B 100F ML722 Bombs	CBAQ 238962	69000	2.98
Do	WTLF5Mk73	Do	Do	Do	510 Bombs Fireworks B 100F ML722 Bombs	IC 35909	73100	2.98
Do	WTLF5Mk70	Do	Do	Do	750 Bombs Fireworks B 100F ML722 Bombs	WTC 118477	71500	2.98
Do	WTLF5Mk71	Do	Do	Do	Do	CBAQ 95398	71800	2.98
Do	WTLF5Mk74	Do	Do	Do	Do	BAR 71716	69800	2.98
Do	WTLF5Mk75	Do	Do	Do	Do	CBAQ 133578	69800	2.98
Do	WTLF5Mk76	Do	Do	Do	Do	CBW 46766	69900	2.98
Do	WTLF5Mk77	Do	Do	Do	Do	IC 95695	71600	2.98
Do	WTLF5Mk79	Do	Do	Do	Do	CBAQ 97-44	72100	2.98

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originally	Supplemental Payments	Refund by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Bill Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	593.43	593.43			Do	Do	127.89	465.53	Do	Do	Do
	644.67	644.67			Do	Do	110.31	534.36	Do	Do	Do
	689.45	689.45			Do	Do	146.43	483.02	Do	Do	Do
	593.97	593.97			Do	Do	108.93	485.04	Do	Do	Do
	599.43	599.43			Do	Do	134.93	464.78	Do	Do	Do
	584.27	584.27			Do	Do	100.19	484.08	Do	Do	Do
	608.58	608.58			Do	Do	136.37	472.21	Do	Do	Do
	605.14	605.14			Do	Do	129.80	469.34	Do	Do	Do
	579.47	579.47			Do	Do	99.35	480.12	Do	Do	Do
	6839.88	6839.88				5458.30	1381.58	5458.30			

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

B and A R R Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
7789 (1944)	WT 4058,376	6-26-44	Ladora, Colo.	Searsport, Me.	720 Bombs Fireworks Bombs, Incendiary 100# M/702 HP Filled W/O Burster Tube	CBQ 131792	72965	2.98
Do	WT 4058A,35	6-30-44	Do	Do	720 Bombs Incendiary Bombs 100#	MILW 702130	72965	2.98
Do	WT 4058AA3	Do	Do	Do	Do	B&M 12876	72965	2.98

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originally	Supplemental Payments	Refunded by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	2178.76	2178.76			2170(1868	1179.01	1006.75	1179.01	Carlotta ICC A-767 see 22-11d	T-660-Filer 172976, 6/44, R.R.B.	Shipment Contested of Complete Explosive Incendiary Bombs
	2176.36	2176.36			2170(1868 29AA	1179.01	1008.35	1179.01		Do	Do
	2176.36	2176.36			2170(1868 29AA	1179.01	1008.35	1179.01	Do	Do	Do
	6527.48	6527.48				3516.03	3011.45	3516.03			

33

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

B and A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description including Packing	Car No. and Initial	Weight	Rate
6456 (1954)	WT 1660867	6-27-44	Huntersville, Ala.	Shreveport, La.	630 Bomb Fireworks N, NOIBN, Bombs E.P. Filled	RTD 97654	21700	2.05¢
Do	WT 1660868	Do	Do	Do	Do	NIDX 71399	18680	2.05¢
Do	WT 1660869	Do	Do	Do	Do	IC 25397	18000	2.05¢
Do	WT 1660870	Do	Do	Do	Do	PRR 80574	18700	2.05¢
Do	WT 1660872	Do	Do	Do	Do	MKT 95187	18000	2.05¢
Do	WT 1660872	Do	Do	Do	Do	NP 42593	19100 or 20000	2.05¢

Land Grant Percent. Deduction	Accountable Freight Charges	Amount Paid Originally	Supplemental Payments	Refund by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	1287.54	1287.54			6456(1952)	568.40	719.52	568.40	Customer's ICC I-600 Section IV-Ist Rule, GRR of 1st Class Plus 5¢ Perm 15% Increase Rates Control ICC C-4563	SE-SE 613282	Shipment Consisted of Complete Explosive Incendiary Bombs
	1296.43	1296.43			Do	558.43	730.00	558.43	Do	Do	Do
	1276.10	1276.10			Do	553.08	723.02	553.08	Do	Do	Do
	1288.69	1288.69			Do	557.31	731.38	557.31	Do	Do	Do
	1276.10	1276.10			Do	553.08	723.02	553.08	Do	Do	Do
	1287.50	1287.50			Do	566.40	583.48	566.40	Do	Do	Do
	7618.56	7618.56				3808.72	3809.84	3808.72			

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

B and A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description including Packing	Car No. and Initial	Weight	Rate
7730(1944)	W 1988449	6-20-44	Ledoux, Calif.	Searsport, Me.	750-Bomb Fireworks Incendiary Bombs 100# SLAC	SAL 13434	75965	7.98

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originally	Supplemental Payments	Refunded by Carrier	Deductions by Gov't Bill Number	Deductions by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	2176.36	2176.36			14	38.06			Carlton's I.C.C. A-767 Section 22-3rd Ost.	B-580 15474 B/A R.R.S	Shipment construed as complete explosive incendiary bombs
					175	595.76					
					178	531.18					
					182	152.08					
					119	5760.71					
					116	6155.50					
					108	215.11					
					105	163.79					
					11	159.89					
					98	357.62					
					176	325.18					
					177	512.36					
					179	324.98					
					180	594.76					
					181	10.53					
					183	594.98					
					184	591.28					
					Loose(4)	5527.32					
					12	60.84					
						1098.73					
					185	530.98					
					186	589.29					
					187	160.17					
					188	357.26					
					189	397.50					
					190	589.29					
					191	14.84					
					192	421.17					
					193	18.18					
					194	478.03					
					195	340.10					
					196	5.76					
					197	63.36					

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

Lead A. RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
7290(1944)	WV 1958116	6-20-44	Lenore, Okla.	Searsport, Me.	780 Boxes Fireworks Incendiary Bombs 100# GLAS	Penn. 96438	78905	2.98
Do	WV 1958399	6-17-44	Do	Do	810 Do	PFC 108337	81715	2.98
Do	WV 1958405	Do	Do	Do	Do	PFC 139315	81715	2.98
Do	WV 1958406	Do	Do	Do	Do	PFC 175789	81715	2.98
Do	WV 1958407	Do	Do	Do	Do	GLIN 909583	81715	2.98
Do	WV 1958409	Do	Do	Do	780 Do	GN 38581	78905	2.98
Do	WV 1958411	6-19-44	Do	Do	810 Do	BAO 13697	81715	2.98
Do	WV 1958415	Do	Do	Do	Do	GLIN 713663	81715	2.98
Do	WV 1958416	Do	Do	Do	Do	BAO 16997	81715	2.98
Do	WV 1958417	Do	Do	Do	Do	GN 11768	81715	2.98
Do	WV 1958418	Do	Do	Do	Do	PFC 114308	81715	2.98
Do	WV 1958419	Do	Do	Do	Do	PFC 121682	81715	2.98

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originally	Supplemental Payments	Refunds by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	7176.56	7176.56							Do	Do	Do
	6537.31	6537.31							Do	Do	Do
	6537.31	6537.31							Do	Do	Do
	6537.31	6537.31							Do	Do	Do
	6535.11	6535.11							Do	Do	Do
	7176.56	7176.56							Do	Do	Do
	6535.11	6535.11							Do	Do	Do
	6535.11	6535.11							Do	Do	Do
	6535.11	6535.11							Do	Do	Do
	6535.11	6535.11							Do	Do	Do
	6535.11	6535.11							Do	Do	Do
	6537.31	6537.31							Do	Do	Do

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

B and A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
Do	NY 1,958,575	Do	Do	Do	Do	NPZ 17658	61715	2.98
Do	NY 1,958,596	6-20-44	Do	Do	Do	PTC 136736	61715	2.98
Do	NY 1,958,598	Do	Do	Do	720 Do	GEM 67982	77965	2.98
Do	NY 1,958,599	6-19-44	Do	Do	Do	RTC 100668	77965	2.98
Do	NY 1,958,531	6-20-44	Do	Do	Do	1&E 1908	77965	2.98
Do	NY 1,958,530	Do	Do	Do	Do	IC 180775	77965	2.98
Do	NY 1,958,537	Do	Do	Do	Do	NP 12698	77965	2.98
Do	NY 1,958,538	Do	Do	Do	Do	CBQ 16886	77965	2.98
Do	NY 1,958,539	Do	Do	Do	Do	CBQ 95350	77965	2.98
Do	NY 1,958,561	Do	Do	Do	810 Do	NP 43606	61715	2.98

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originly	Supplemental Payments	Refunds by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	2635.22	2635.22							Do	Do	Do
	2635.22	2635.22							Do	Do	Do
	2176.36	2176.36							Do	Do	Do
	2176.36	2176.36							Do	Do	Do
	2176.36	2176.36							Do	Do	Do
	2176.36	2176.36							Do	Do	Do
	2176.36	2176.36							Do	Do	Do
	2176.36	2176.36							Do	Do	Do
	2176.36	2176.36							Do	Do	Do
	2176.36	2176.36							Do	Do	Do
	2635.22	2635.22							Do	Do	Do
	53633.09	53633.09				27895.08	24136.08	27895.08			

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

B and A RR Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
4103(1944)	WT 1237005	5-14-44	Huntsville, Ala.	Searsport, Me.	510 Boxes Fireworks "P" 100# M-47A2, Bombs W. P. Filled	BAL 19082	82715	2.98
Do	WT1237006	Do	Do	Do	Do	MET 76952	82715	2.98
Do	WT1237007	5-25-44	Do	Do	Do	LSI2102	73715	2.98
Do	WT1237012	5-14-44	Do	Do	590 Do	RTC 17165A	82715	2.98
Do	WT1237108	5-16-44	Do	Do	630 Do	CBAQ 97584	73715	2.98
Do	WT1237106	Do	Do	Do	780 Do	CBAQ 133569	73715	2.98
Do	WT1186329	5-21-44	Do	Do	630 Do	GBW 59956	63000	2.98
Do	WT1186395	Do	Do	Do	Do	GTW 460090	61700	2.98
Do	WT1186386	Do	Do	Do	Do	MP 15110	68300	2.98

Land Grant Percent. Deduction	Accessorial Freight Charges	Amount Paid Originally	Supplemental Payments	Refunded by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	2463.46	2463.46			17 16A 443 2057 (1944) 97	2553.75 1277.46 123.96 8098.34 2336.97	1857.97	610.49	Durlete's ICC 2-357 Section 22-1A-f Quotation	C-060-C 78035 T/A S.B.E.	Shipment Consisted of Complete Explosive Incendiary Bombs
	2463.46	2463.46			Do		1857.97	610.49	Do	Do	Do
	2463.46	2463.46			Do		1857.97	610.49	Do	Do	Do
	2463.46	2463.46			Do		1857.97	610.49	Do	Do	Do
	2177.07	2177.07			Do		1687.56	489.51	Do	Do	Do
	2177.07	2177.07			Do		1687.56	489.51	Do	Do	Do
	1296.65	1296.65			Do		731.00	565.65	Do	Do	Do
	1280.27	1280.27			Do		788.34	552.03	Do	Do	Do
	1280.27	1280.27			Do		722.87	557.40	Do	Do	Do

Statement showing losses due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

Road A R'R Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
Do	WT 1686397	5-13-43	Bethel Me.	Searsport, Me.	400 Do	ISAM 43726	57400	2.98
Do	WT 1686399	5-21-43	Do	Do	770 Do	PE 33778	76900	2.98

Land Grant Rates Deficiency	Freight Charges	Amount Originally Paid	Supplemental Payments	Refunds by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Docket or Special Authority	Government File Reference	Basis for Claim
	1286.33	1286.33			Do		680.66	585.49	Do	Do	Do
	1539.20	1539.20			Do		969.07	570.13	Do	Do	Do
	2806.70	2806.70				648.48	1649.55	1156.62			

Statement showing amounts due Bangor and Aroostook Railroad Company from the United States representing differences account disputed application of rates on shipments of incendiary bombs

Bond A Bill Number	Government Bill of Lading No.	Date of Shipment	Point of Origin	Destination	Commodity Description Including Packing	Car No. and Initial	Weight	Rate
7308 (1944)	WT 1937105	5-16-44	Bunnell, Fla.	Bucksport, Me.	710 Bombs Fireworks 3 100F M.742 Bombs K.F.Filled	NTC 121692	51725	2.98

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originly	Supplemental Payments	Refunded by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
	$63.90	$63.90			4313(1952)	997.84	Cr. 433.94	997.84	Carlotta's A-767 Section 22-Int Quotation	T-560 (St-178993 W.B.L. 6/24	Shipment Contested of Complete Explosive Incendiary Bombs

*When the Government made a deduction against a current bill rendered, such deduction did not necessarily apply to the alleged overcharge on a particular bill of lading. Rather it was the practice of the Government to apply the total amount of a group of current bills against the total amount of alleged overcharges on a group of bills of lading. It is therefore impossible to say that any particular current bill necessarily applies to a particular bill of lading. However, the total amount of deductions made from current bills is equal to the total amount of overcharges as alleged by the Government. Thus, as set forth on Sheet No. 17 shows total Deductions from current bills as $79,131.96, and likewise shows total alleged overcharges as $80,131.96.

Exhibit A
Sheet 17 of 17 Sheets

SUMMARY

Land Grant Percent. Deduction	Assessable Freight Charges	Amount Paid Originally	Supplemental Payments	Refunds by Carrier	Deduction by Gov't Bill Number	Deduction by Gov't Amount	Net Amount Paid	Balance Due	Tariff Reference and Item or Special Rate Authority	Government File Reference	Basis for Claim
Sheet 1	9158.11	9158.11				3906.29	5251.82	3906.29			
4	28933.08	28933.08				13457.30	15475.78	13457.30			
6	31159.13	31159.13				15894.59	15264.54	15894.59			
8	6839.88	6839.88				5458.30	1381.58	5458.30			
9	6527.48	6527.48				3516.03	3011.45	3516.03			
10	7418.56	7418.56				3208.72	4209.84	3208.72			
13	53411.03	53411.03				27285.01	26126.02	27285.01			
15	20806.70	20806.70				6408.48	14398.22	6408.48			
16	563.90	563.90				997.24	(433.34	997.24			
	164817.87	164817.87				80131.96	84685.91	80131.96			

62 In the United States Court of Claims

No. 104-54

[File endorsement omitted]

[Title omitted]

STATEMENT OF FACTS FOR ADMISSION UNDER RULE PRESCRIBING PROCEDURE IN RAILROAD CASES—Filed March 22, 1954

1. The plaintiff, a corporation of the State of Maine, is a common carrier by railroad over its own lines and jointly with other common carriers by railroad.

2. In 1944, the plaintiff as the final and delivering carrier performed transportation service for the defendant, from various points of origin in the United States to destination points on plaintiff's lines, as shown in the attached Exhibit A. The freight charges on the said shipments were billed by the plaintiff and were originally paid by the defendant's disbursing officers, in accordance with Section 66, Title 49, U. S. Code, and were subsequently audited by the General Accounting Office. Adjustments were made by deductions from other bills due the plaintiff by the General Accounting Office.

3. On each of the shipments in question, the applicable freight charges, on the basis of the court's decision in Union Pacific Railroad Co. v. United States, No. 49505, on April 7, 1953, the amount paid originally, the amount of any supplemental payments made by the defendant, the deductions made by the defendant from other bills due the plaintiff, the net amount paid, and the
63-80 balance due on the basis of the applicable published rates or other rate authority cited, are shown in the attached Exhibit A.

4. The deductions made by the defendant from other bills due the plaintiff were made within six years prior to March 10, 1954.

LAWRENCE CAKE,
Attorney for Plaintiff.

EXHIBIT "A" TO STATEMENT

Omitted. Printed side page 46 ante.

81 In the United States Court of Claims

[Title omitted]

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS FOR ADMISSION AND PLAINTIFF'S SCHEDULE A UNDER RULE EFFECTIVE APRIL 1, 1953 PRESCRIBING PROCEDURE IN COMMON CARRIER CASES —Filed December 29, 1954

1. Admitted.
2. Admitted.
3. Defendant denies that there is due plaintiff the sum of $80,-131.96 and avers that should plaintiff prevail in this action the correct amount due would be $73,056.95. Attached hereto is a tabulation and computation designated Defendant's Schedules A and B and Summary Sheet setting forth the said computations and authorities relied upon where exception is taken to computations on Plaintiff's Exhibit A. Defendant further avers that the basis upon which plaintiff computed its transportation charges as set forth in its Exhibit A to the petition for shipments comprising bomb bodies filled with Napalm gel without bursters or
82 fuzes is improper; that the charges for the shipments herein concerned have heretofore been settled on the proper basis and that plaintiff is due nothing further on such shipments.
4. Admitted.

WARREN E. BURGER,
Assistant Attorney General,
Civil Division.

MARTIN E. RENDELMAN,
Attorney, Civil Division,
Department of Justice.

Schedule A to Response

Bangor and Aroostook Railroad Company

v. United States, Court of Claims No. 104-54

Sheet 1 of 1 sheets

ITEM NO.	Balance Due		Rate Authority	Remarks
	Plaintiff	U. S.		
1	3901.29			
2	10990.69			
3	13263.47			
4	5453.38			
5	3290.92			
6	3288.72			
7	25251.60			
8	6650.93			
9	997.39			
1	73056.99			Net amount due Plaintiff

83

COPY BOUND VERTICALLY

Bituminous and ... Railway Equipment Company v. ... Co. ... 64-54

Defendant's

Sheet 1 of ...

Plaintiff's Bill Number	Government Bill of Lading Number	Date of Shipment	Origin	Destination	Commodity Description (Including Packing)	Car Number and Initial	Weight	Rate	Land-grant Percentage deduction	Assessable Freight charges	Amount Paid originally	Supplemental Payment	Refunds	Deduction by Govt. Bill No.	Deduction by Govt. Amount	Net Amt. Paid	Balance Due Plaintiff	Balance Due U. S.	Date Authority	Remarks
648 (1949)	W7-930651	5-1-44	Bon Terre	Ironsides, Miss.	Bituminous Fine (Explosives Subsistence)	AT- 48429	62.5	1.15		11.56.69	13.57.96			E359 Item 9390 E333	585.10	672.86	672.86		Voucher	Bituminous Fine (Explosives Subsistence)
	W7-930693	✓	✓	✓	✓	LP 5554	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930699	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930695	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930697	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930698	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930699	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930700	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930701	5/5/44	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930703	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930704	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓
✓	W7-930705	✓	✓	✓	✓	[illegible]	✓	✓		11.58.69	13.57.96			✓	585.10	672.86	672.86		✓	✓

Engraved. Rem. Co. & Railroad Company v. Hunt et al. U.S. Circuit Court. Vam. Dec. 1874-5 [illegible]

89 In the United States Court of Claims

[Title omitted]

DEFENDANT'S ANSWER—Filed December 29, 1954

Defendant for its answer to the petition herein alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that plaintiff performed transportation services for defendant as alleged in paragraph 2 of the petition except that defendant denies that the articles transported were described solely as incendiary bombs or that said articles were in fact incendiary bombs. Defendant avers that the shipments were variously described, usually as comprising "Fireworks 'B' 100# M47A2 BOMBS, NP Filled," and as "Fireworks, BOMBS Incendiary, 100 lb., M47A2, NP filled, w.o. burster fuze or wire."

3. Admits the allegations contained in paragraph 3 of the petition.

90 4. Denies the allegations contained in paragraph 4 of the petition and avers that in the event that plaintiff should prevail in this action then the proper amount due would be $73,-056.95.

5. Does not have sufficient knowledge or information upon which to predicate a belief with respect to the allegations contained in paragraph 5 of the petition and therefore denies the same.

6. Denies each and every allegation in the petition not heretofore admitted, denied or qualified.

AS A COUNTERCLAIM

7. Defendant alleges that on bills of lading listed in plaintiff's exhibit A to the petition under Bills No. 6103 (1944), 5610 (1944), 7269 (1944), 6453 (1944), 6454 (1944) and 7217 (1944) there is presently due to defendant from plaintiff the sum of $8,918.15 on the basis of the charges as computed by defendant for the shipments therein concerned.

91 WHEREFORE, defendant demands judgment:

1. Dismissing the petition with costs taxed against plaintiff.

2. For $8,918.15 on its counterclaim with interest thereon as provided by law.

WARREN E. BURGER,
Assistant Attorney General,
Civil Division.

MARTIN E. RENDELMAN,
Attorney, Civil Division,
Department of Justice.

92 In the United States Court of Claims

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT UNDER RULE 51—Filed February 8, 1955

The plaintiff moves for judgment on the pleadings or for summary judgment under Rule 51, in the sum of $73,056.95, on the ground that the defendant's answer and response to the plaintiff's statement of facts for admission show that the amount stated is due on the basis of the court's decision in a previous case, *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390, and there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law.

LAWRENCE CAKE,
Attorney for Plaintiff.

93 STATEMENT

The facts stated in the petition and in the plaintiff's statement of facts for admission, as admitted by the defendant's answer and response to the statement of facts for admission, are as follows:

1. The plaintiff is a common carrier by railroad over its own lines and jointly with other common carriers by railroad.

2. In 1944 the plaintiff and its connections performed transportation service for the defendant by carrying a number of shipments of articles decribed in the bills of lading as

Fireworks, B. M47A2 Bombs N.P. Filled;
Fireworks, B. 100# Bombs N.P. Filled;
Incendiary Bombs Inflammable Solids;
Fireworks Bombs Incendiary 100# M47A2 N.P. Filled W/O Bursters Fuze;
Fireworks Incendiary Bombs 100#;
Fireworks B 100#;
Fireworks B 100# M47A2 Bombs N.P. Filled;
Fireworks 100# M47A2 Bombs N.P. Filled;
Incendiary Bombs 100#;

from various points of origin to a destination point on plaintiff's lines.

(Par. 2 of plaintiff's statement of facts for admission and accompanying verified Schedule A, admitted by defendant's response thereto).

3. The transportation charges for the said shipments are claimed by the plaintiff on the basis of classification of the said articles

as incendiary bombs, under Item 1820 of the freight classification, and the rates applicable thereto. The charges paid by
94 the defendant, through settlements made by the General Accounting Office, are on the basis of classification of the articles shipped as combination articles under Rule 18 of the freight classification and the rates applicable thereto.

(Par. 3 of petition, admitted by defendant's answer).

4. On the basis claimed by plaintiff, and the court's decision in *Union Pacific Railroad Company* v. *United States*, No. 49505, the balance due the plaintiff, as reported by the General Accounting Office, is $73,056.95.

(Par. 3 of plaintiff's statement of facts for admission, and defendant's response thereto).

The issue in this case is identical with the issue tried in the *Union Pacific* case, 125 C. Cls. 390, whether incendiary bombs filled with NP or PT1 incendiary gels, but without bursters and fuzes, should be classified and rated as incendiary bombs, as contended by the plaintiff, or as combination articles under Rule 18 or by analogy to other lower rated articles under Rule 17 of the freight classification, as contended by the General Accounting Office. The *Union Pacific* case was decided on April 7, 1953, on the issue of liability. The defendant filed a motion for a new trial which was overruled on July 13, 1953. Final judgment for the plaintiff was entered on November 3, 1953. There was no application for certiorari. An appropriation was made for payment of the judgment and it has been paid.

In a similar case, *Southern Pacific Company* v. *United States*, No. 49628, judgment for the plaintiff was entered on May 4, 1954, on a stipulation. 128 C. Cls. 773. That judgment likewise was reported for appropriation and has been paid.

95 The plaintiff in this case is entitled to judgment for the amount stated above which is the amount due, as reported by the General Accounting Office, on the basis of the court's decision in the *Union Pacific* case.

LAWRENCE CAKE,
RAYMOND A. NEGUS,
Attorneys for Plaintiff.

96 In the United States Court of Claims

No. 250-54

SEABOARD AIR LINE RAILROAD COMPANY, PLAINTIFF,

v.

THE UNITED STATES, DEFENDANT

PETITION—Filed June 24, 1954

To the Honorable Chief Judge and Associate Judges of the United States Court of Claims:

The plaintiff, Seaboard Air Line Railroad Company, respectfully represents:

1. Plaintiff is a corporation organized and existing under the laws of the State of Virginia and as such corporation now is, and has been since August 1, 1946, engaged as a common carrier by railroad, in the transportation of persons and property for hire, in both intrastate and interstate commerce over its own lines and jointly with other carriers.

97 2. On August 1, 1946, plaintiff became the successor in ownership and operation of the properties of the Seaboard Air Line Railway Company, which latter company prior to December 23, 1930, operated an extensive railroad system comprising approximately forty-two hundred (4,200) miles of railroad lines within and through the States of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama. That Legh R. Powell, Jr., and Henry W. Anderson were appointed Receivers of the properties and assets of said Seaboard Air Line Railway Company by orders of the District Court of the United States for the Eastern District of Virginia on December 23, 1930, and December 30, 1932, respectively, and as such Receivers operated said line of railroad until August 1, 1946.

3. On April 12, 1945, a Final Decree of Foreclosure and Sale was entered and Tazewell Taylor was appointed Special Master to sell all the properties and assets of said Seaboard Air Line Railway Company which sale took place on May 31, 1945. By Bill of Sale dated July 1, 1946, pursuant to decrees of the District Court of the United States for the Eastern District of Virginia and for the Southern District of Florida, the said Tazewell Taylor, Special Master, and others, conveyed to the Seaboard Air Line Railroad Company, the plaintiff herein, all of the personal property, including rolling stock, accounts receivable, etc., which had been sold pursuant to said Final Decree of Foreclosure. Said Bill of Sale was executed and delivered on August 1, 1946, and trans-

ferred by operation of law to plaintiff the claim hereinafter referred to against the United States of America.

4. Plaintiff, Seaboard Air Line Railroad Company, and/or Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of
98 the Seaboard Air Line Railway Company, are hereinafter referred to as plaintiff.

5. In 1944 plaintiff performed transportation services for the defendant over its own lines and jointly with other carriers whose lines connect with the plaintiff's lines, by carrying a number of shipments of articles described as incendiary bombs as shown in statements identified as Schedules A and B, filed herewith and by reference made part hereof.

6. For the transportation services rendered, the charges claimed by the plaintiff are on the basis of classification of the articles shipped as "Bombs, Incendiary", pursuant to Item 1820 of the Consolidated Freight Classification, and the rates applicable thereto. The settlements made by the General Accounting Office, after audit by means of deductions from subsequent bills made on or after June 24, 1948, are on the basis of classification as combination articles under Rule 18 of the Consolidated Freight Classification and the rates applicable thereto. Further details of the said shipments with reference to the bills of lading, dates of shipments, plaintiff's bill numbers, and the transportation charges billed and paid, are shown in Schedules A and B hereto.

7. Plaintiff avers that the correct and lawful transportation charges on the said shipments are as stated in Schedules A and B hereto, that the defendant has refused and failed to pay the correct and lawful charges as stated, and that there is due and owing plaintiff from the United States a balance of $28,829.55.

8. Plaintiff further avers that no action, suit or process is pending in any other court on account of this claim; that no action has been had thereon in Congress or by any of the executive
99 departments or agencies other than as herein stated; that plaintiff is the owner of the claim and no assignment or transfer of the whole or any part thereof or any interest therein has been made, other than as stated in paragraph 3 above.

WHEREFORE, plaintiff prays judgment against the defendant for $28,829.55.

SEABOARD AIR LINE RAILROAD COMPANY
By LAWRENCE CAKE,
Its Attorney.

SEABOARD AIR LINE RAILROAD COMPANY
Norfolk, Virginia
LAWRENCE CAKE,
1001 Connecticut Avenue,
Washington 6, D. C.,
Attorney of Record.

100 [File endorsement omitted]

In the United States Court of Claims

No. 250-54

[Title omitted]

STATEMENT OF FACTS FOR ADMISSION UNDER ORDER OF MARCH 11, 1953, PRESCRIBING PROCEDURE IN RAILROAD CASES—Filed July 23, 1954

1. The plaintiff, a corporation of the State of Virginia, is a common carrier by railroad over its own lines and jointly with other common carriers by railroad.

2. In 1944, the plaintiff as the final and delivering carrier performed transportation service for the defendant, from various points of origin in the United States to destination points on plaintiff's lines, as shown in the attached Schedules A and B. The freight charges on the said shipments were billed by the plaintiff and were originally paid by the defendant's disbursing officers, in accordance with Section 66, Title 49, U. S. Code, and were subsequently audited by the General Accounting Office. Adjustments were made by deductions from other bills due the plaintiff by the General Accounting Office.

3. On each of the shipments in question, the applicable freight charges, on the basis of the court's decision in Union Pacific Railroad Co. v. United States, No. 49505, on April 7, 1953, the amount paid originally, the amount of any supplemental payments made by the defendant, the deductions made by the defendant from other bills due the plaintiff, the net amount paid, and the
101 balance due on the basis of the applicable published rates or other rate authority cited, are shown in the attached Schedules A and B.

4. The deductions made by the defendant from other bills due the plaintiff were made within six years prior to June 24, 1954.

LAWRENCE CAKE,
Attorney for Plaintiff.

"[illegible] AIRLINE RAILROAD EQUIPMENT V. UNITED STATES" [illegible] AS CLAIMS NO. 350-54

Sheet 5 of 8 sheets

DETAIL OF GET AMOUNTS PAID ON TRAFFIC PASSING TO AND BEYOND TRANSIT STATION

Line Item	Through Shipment	Rate Authority	Govt. GTL No.	Date	From	Transit Station	To	Commodity	Car No.	Weight	Rate	Local Grant	Paid Origin	Carrier	Bill No.	Rate Charged	Refund	Deductions for Non-Transit Bill No.	Deductions for Non-Transit Amount	Net Paid	Balance Due Claimed	Balance Due G. L.	Remarks
	1799.02	[illegible]	[illegible]	8-2-46		[illegible]	[illegible]	[illegible]	[illegible]	17 300	45		44.23	[illegible]	[illegible]	–	–	[illegible]	791.91	1241.34			[illegible]
	2.96	[illegible]				[illegible]	[illegible]	[illegible]		70	4th		46.85										To be added to
	2.97							[illegible]		70			2.97										[illegible]
	.92									60			1.90										[illegible]
	1835.07		[illegible]	8-16-46	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]	[illegible]		[illegible]	[illegible]	[illegible]	–	–	–	–	1240.84			[illegible]
						[illegible]		[illegible]					[illegible]							[illegible]	76.68		[illegible]

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112 In the United States Court of Claims

[Title omitted]

DEFENDANT'S ANSWER—Filed January 31, 1955

Defendant for its answer to the petition herein alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Defendant does not have sufficient knowledge or information upon which to predicate a belief with respect to the allegations contained in paragraphs 2 and 3 of the petition and therefore denies the same.

3. Admits the allegations contained in paragraph 4 of the petition.

4. Admits the allegations contained in paragraph 5 of the petition except that defendant avers that the articles were described on the pertinent bills of lading as "Fireworks 'B' 500# M47A2 Incen. Bombs, NP Filled", and in at least one instance as
113 "Fireworks, BOMBS, Incendiary, 100 lb., M47A2 NP filled, w/o burster, fuze or wire."

5. Admits the allegations contained in paragraph 6 of the petition except as qualified by paragraph 3 of Defendant's Response to Plaintiff's Request for Admission of Facts.

6. Denies the allegations contained in paragraph 7 of the petition.

7. Defendant does not have sufficient knowledge or information upon which to predicate a belief with respect to allegations contained in paragraph 8 of the petition and therefore denies the same.

8. Denies each and every allegation in the petition not heretofore admitted, denied or qualified.

WHEREFORE defendant demands judgment dismissing the petition and assessing costs against plaintiff as provided by law.

WARREN E. BURGER,
Assistant Attorney General,
Civil Division.

MARTIN E. RENDELMAN,
Attorney, Civil Division,
Department of Justice.

PREVIOUS FOLDOUTS TOO
LARGE FOR FILMING

114 In the United States Court of Claims

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT UNDER RULE 51—Filed February 8, 1955

The plaintiff moves for judgment on the pleadings or for summary judgment under Rule 51, in the sum of $28,561.93, on the ground that the defendant's answer and response to the plaintiff's statement of facts for admission show that the amount stated is due on the basis of the court's decision in a previous case, *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390, and there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law.

LAWRENCE CAKE,
Attorney for Plaintiff.

115 STATEMENT

The facts stated in the petition and in the plaintiff's statement of facts for admission, as admitted by the defendant's answer and response to the statement of facts for admission, are as follows:

1. The plaintiff is a common carrier by railroad over its own lines and jointly with other common carriers by railroad.

2. In 1944 the plaintiff and its connections performed transportation service for the defendant by carrying a number of shipments of articles described in the bills of lading as

Fireworks 'B' 500# M47A2 Incendiary Bombs NP Filled;
Fireworks, Bombs Incendiary, 100# M47A2,
NP Filled, without Burster fuze or wire;

from various points of origin to destination points on plaintiff's lines.

(Par. 5 of petition and Par. 2 of plaintiff's statement of facts for admission and accompanying Schedules A and B, as admitted by defendant's answer and response thereto)

3. The transportation charges for the said shipment are claimed by the plaintiff on the basis of classification of the said articles as incendiary bombs, under Item 1820 of the freight Classification, and the rates applicable thereto. The charges paid by the defendant, through settlements made by the General Accounting Office, are on the basis of classification of the articles shipped as combination articles under Rule 18 of the freight classification and the rates applicable thereto.

(Par. 6 of petition, admitted by defendant's answer).

116 4. On the basis claimed by plaintiff, and the court's decision in *Union Pacific Railroad Company* v. *United States*, No. 49505, the balance due the plaintiff, as reported by the General Accounting Office, is $28,561.93.

(Par. 3 of plaintiff's statement of facts for admission, and defendant's response thereto).

The issue in this case is identical with the issue tried in the *Union Pacific* case, 125 C. Cls. 390, whether incendiary bombs filled with NP or PT1 incendiary gels, but without bursters and fuzes, should be classified and rated as incendiary bombs, as contended by the plaintiff, or as combination articles under Rule 18 or by analogy to other lower rated articles under Rule 17 of the freight classification, as contended by the General Accounting Office. The *Union Pacific* case was decided on April 7, 1953, on the issue of liability. The defendant filed a motion for a new trial which was overruled on July 13, 1953. Final judgment for the plaintiff was entered on November 3, 1953. There was no application for certiorari. An appropriation was made for payment of the judgment and it has been paid.

In a similar case, *Southern Pacific Company* v. *United States*, No. 49628, judgment for the plaintiff was entered on May 4, 1954, on a stipulation. 128 C. Cls. 773. That judgment likewise was reported for appropriation and has been paid.

The plaintiff in this case is entitled to judgment for the amount stated above which is the amount due, as reported by the General Accounting Office, on the basis of the court's decision in the *Union Pacific* case.

LAWRENCE CAKE,
RAYMOND A. NEGUS,
Attorneys for Plaintiff.

117 In the United States Court of Claims

Nos. 104-54 and 250-54

THE BANGOR AND AROOSTOOK RAILROAD CO., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

THE SEABOARD AIR LINE RAILROAD CO., PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVITS ATTACHED TO BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT—Filed April 1, 1955

118 EXHIBIT 1

AFFIDAVIT

ARLINGTON COUNTY,
State of Virginia, ss.

I, Sidney Katz, being duly sworn do depose and say—

I am an employee of the Department of Army and assigned to the Office Chief Chemical Officer, Materiel Division, Procurement Branch, in connection with procurement and shipment of Chemical Corps materiel.

I have been so employed since the year 1944. As part of my duties I have had occasion to familiarize myself with and have been engaged in the procurement of fire bombs (gasoline tank type).

In connection with the procurement of aforementioned fire bomb, said bomb was and is received by the Chemical Corps from its contractors as a fire bomb less filling (gasoline and napalm). The napalm thickener was and is shipped separate and apart from the bomb body to the Air Force by the Chemical Corps.

(S.) SIDNEY KATZ.

Sworn to before me this 30th day of March 1955.

(S.) EVELYN W. ZIMMERMAN,
Notary Public.
(SEAL)

My Commission Expires April 1st, 1956.

119 EXHIBIT 2

STATE OF VIRGINIA,
County of Arlington, ss.

AFFIDAVIT

JOHN A. MCCONNELL being first duly sworn on oath deposes and states:

1. That I am and have been employed in the Office of the Chief of Transportation, Freight Traffic Division, Rate Negotiation Branch, Classification Section since June 1945; that I am Assistant Chief of the Classification Section, which is responsible for handling all matters pertaining to the proper freight classification of all materials shipped by the Department of the Army;

2. That I have examined the official files of the Army which contain the following letter of 4 May 1945 from the Official Classification Committee:

120 OFFICIAL CLASSIFICATION COMMITTEE
143 Liberty Street
New York, N. Y.

May 4, 1945
in your reply refer to WSF 429
"Incendiary Bombs filled with Napalm
(soap and gasoline)

"Commanding Officer
NY Chem Warfare Proc Div.
292 Madison Avenue
New York, N. Y.

ATTENTION: Lt. W. J. Hanrahan, Transp. Officer

Dear Sir:

"This will acknowledge receipt of your letter even date, file SPCYN (T) 471.6 regarding incendiary bombs filled with napalm.

"This will confirm advice given to your Mr. Uecker by telephone on November 23, 1943, that these incendiary bombs filled with napalm (soap and gasoline) were ratable by analogy as Empty Aerial Bombs, Item 1895 of the Classification.

"Our record indicates that these incendiary bombs consisted of a steel tube containing napalm, but were not a finished bomb in that they needed a powder charge and primer and that they were not dangerous.

Yours truly,

OFFICIAL CLASSIFICATION COMMITTEE
Member"

jmw

3. That I am advised that the shipments involved in *Bangor and Aroostook Railroad Company* v. *The United States*
121 (No. 104-54) and in *Seaboard Air Line Railroad Company* v. *The United States* (No. 250-54) all took place during the year 1944.

4. That my examination of the official files of the Army shows that the 1943 telephone ruling of the Official Classification Committee described in the text of the 4 May 1945 letter, set forth in paragraph 2 above, was in effect at least through the year 1944 and was not rescinded or repudiated by the Official Classification Committee until sometime after 1944.

5. That on the basis of my experience in the transportation field and from my personal knowledge I know: (a) that the various classification committees prepare the Consolidated Freight Classification; (b) that it is not unusual for any shipper who is in doubt as to the appropriate classification rating applicable to his shipment to get in touch with the classification committee for its opinion and ruling as to the appropriate classification rating; and (c) that at the time the shipments involved in these cases were made, the Army as a shipper frequently requested such rulings from the classification committee.

(S.) JOHN A. MCCONNELL.

Subscribed to and sworn before me this the 29th day of March 1955.

(S.) WALTER E. SCOTT,
Notary Public.

(SEAL)

My Commission Expires March 10, 1956.

122 ARGUMENT AND SUBMISSION OF CASES.

On May 2, 1955, the cases were argued and submitted together on plaintiffs' motions for judgment on the pleadings or for summary judgment by Mr. Lawrence Cake for the plaintiffs and by Mr. Morton Hollander for the defendant.

123 In the United States Court of Claims

No. 42-54

THE WESTERN PACIFIC RAILROAD COMPANY

v.

THE UNITED STATES

No. 104-54

BANGOR AND AROOSTOOK RAILROAD COMPANY

v.

THE UNITED STATES

No. 250-54

SEABOARD AIR LINE RAILROAD COMPANY

v.

THE UNITED STATES

SUPPLEMENTAL AFFIDAVITS ATTACHED TO BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT—Filed May 2, 1955

124 EXHIBIT 1

STATE OF NEW YORK, COUNTY OF RENSSELAER, CITY OF TROY

WALTER H. BAUER, being duly sworn deposes and says: "I am a physical chemist, Professor of Physical Chemistry at Rensselaer Polytechnic Institute and head of the physical chemistry division of the chemistry department. My educational background
125 includes Doctor of Philosophy from the University of Wisconsin.

During the second World War I was assigned to the Chemical Corps Technical Command at Army Chemical Center, Maryland. My work was to assess the value of incendiary materials and to provide technical means of ascertaining the quality of thickeners for hydro-carbon oils to be used in incendiary manufacture.

Since the war I have been consultant for the Chemical Corps at various periods and have been continually under contract with the Chemical Corps to study the properties of agents similar to napalm. I have acted as a private consultant concerning napalm for Standard of Indiana and Phipps Products Company.

Napalm came into use about 1941. Since then, and up to the present time, I have been engaged in the development of napalm and similar products.

At Edgewood Arsenal my duties were to determine the value, relative value of various incendiary materials. I obtained data leading to specifications for the preparation of inflammable gels for bomb fillings and for flamethrower use. I visited factories preparing bomb fillings and factories making napalm, the thickener for napalm gel. The specific nature of my work under contract with the Chemical Corps has been the study of the reasons for the properties of thickeners used in making inflammable oils
126 as far as their molecular structure was concerned.

I have previously been called as an expert witness in a case before the Court of Claims concerning the question of the nature of napalm. The question involved whether napalm was a soap or was a chemical otherwise undesignated by name. This action was brought by a group of railroads against the Government over a matter concerning the rates of shipment of napalm thickener. The attorney for the Government was Mr. Dibble. It was approximately five years ago, and is described as Case No. 49168, Union Pacific R. R. vs. the United States.

Napalm gel which is used in filling bombs are mixtures of non-inflammable material consisting of mixed aluminum soaps and combustible liquids such as gasoline. Napalm gel consisted of a mixture of aluminum soaps (napalm) and gasoline. This mixture was used because of its sticky properties and because of its comparatively slow burning rate. The mixture itself is not self-igniting. In use it requires that an igniting material of incendiary material be supplied with the napalm gel. Napalm gel bombs are steel containers filled with napalm gel, the mixture of soap and gasoline referred to previously. This mixture will ignite only if a match or powder, or burning powder, or other incendiary material is supplied. This is supplied in practice by the
127 addition of a burster placed in a well in the bomb.

Therefore the characteristics of a napalm-gel filled bomb are similar to those of a steel container filled with gasoline, with the exception that the napalm gel filling does not flow as readily as gasoline and if ignited does not burn as rapidly as gasoline.

I would like to distinguish between an incendiary material and an inflammable material. An incendiary material is an agent that can cause or initiate combustion or burning. An inflammable material is a material that is capable of being ignited, or burning. Examples of these are as follows: An incendiary material is a match or spontaneously inflammable solids such as phosphorus, sodium; and liquids such as carbon disulphid. Examples of inflammable materials are given by gasoline and petroleum oils.

Now gasoline is inflammable but will not spontaneously ignite; it requires the presence of a flame or other source of ignition. The characteristics of napalm gel made from napalm soap and gasoline

are similar to those of gasoline itself. For instance, the vapor pressure and the flash-point are very closely the same for the napalm gel and gasoline. On this account it is of equal difficulty or ease to ignite gasoline or napalm gel.

Napalm gel in bombs does not have any incendiary quali-
128 ties. It is stable indefinitely, having the same characteristic with respect to ignitibility as a similar container full of gasoline.

Although I understand the bomb formerly was called in Army nomenclature an incendiary bomb, it is not in fact incendiary until the burster is inserted. I further understand that the Army nomenclature has now been corrected so that the term incendiary bomb refers to a *completed* bomb containing all components, including the burster and fuse.

The hazards in transporting napalm-gel filled bombs are similar in nature to those in transporting gasoline in steel containers, with one exception. The thickened characteristic of the gasoline in napalm gel makes it less likely to leak from small holes or to flow rapidly out of an orifice in the steel container, if one should occur. It is thus essentially of the same order of hazard in shipping as gasoline, if anything possibly less hazardous in shipping.

Actually no chemical combination occurs between the aluminum soap and gasoline; the mixture called napalm gel is a physical mixture. It is similar in nature to a brush heap consisting of the molecules of aluminum soap over which is poured the liquid, which does not dissolve in the brush heap. This brush heap, which we are speaking of figuratively, of napalm, causes the gasoline to flow less readily than it would when pure and thus the gel has the property of thickness and stickiness. Because the mixture is
129 a physical mixture, the properties of the gasoline in the napalm gel are essentially unchanged as to chemical nature in which inflammability is involved. The flow properties of the mixture are of course changed; these are physical properties.

For the common industrial uses of napalm and similar aluminum soaps, the napalm is mixed with oils and other materials at the point of use.

Materials similar to napalm have been shipped industrially as soap; for instance, aluminum stearate, and at the rates of soaps. It may be noted that the napalm-gel filled steel bombs were commonly shipped in wooden cases, which would hardly be expected if they were incendiary in nature.

In summary, the napalm content of napalm gel is not incendiary. The material is similar to a sodium hand soap in inflammability. This means it is not easy to ignite. A match applied to napalm powder will not cause it to burn. It must be heated, and after application of heat and igniting, or incendiary agent, napalm soap

will burn. It is less easily ignitable than the ordinary petroleum oil such as diesel oil. The mixture of soap and gasoline called napalm gel is itself of similar nature to gasoline as to inflammability. Like gasoline it is not incendiary; that is, it is not an agent that causes combustion. Its ease of ignition or flashpoint is like that of gasoline. In short, the hazards in shipping napalm-gel filled bombs without bursters are similar to or less than the hazards in
130 shipping gasoline.

(S.) WALTER H. BAUER.

State of New York, County of Rensselaer.

Subscribed and sworn to before me this 29 day of March 1955.

[SEAL] [S] Kenneth J. Plant,
KENNETH J. PLANT,
Notary Public, State of New York,
Residing in Rensselaer County.

Commission expires March 30, 1955.

EXHIBIT 2

United States Court of Claims

No. 42-54

THE WESTERN PACIFIC RAILROAD COMPANY, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

PITTSBURGH, PENNSYLVANIA, ss.

I, Dr. Robert W. Van Dolah, being duly sworn on oath, depose and say:

I. That I am the Chief, Division of Explosives Technology, Region V, Bureau of Mines, in the Department of the Interior, that I received the degree of Doctor of Philosophy in Organic Chemistry from the Ohio State University in 1943; that I was the head of the Organic Chemistry Branch and the head
131 of the Chemical Division of the Naval Ordnance Test Station from 1946 through 1954.

II. That, among other official duties, the Division in which I am presently employed is charged with the testing of explosives

and conducting research on explosives and combustion phenomena. Similar work is done by this Division under contract with the military branches of the Government in connection with related subjects.

III. That I am familiar with Napalm gel and its uses through study and through work on materials related thereto, including its use as a filler in an incendiary bomb.

IV. That an incendiary is an agent capable, in itself, of igniting materials.

V. That an incendiary bomb is a bomb designed to burn rather than detonate in use.

VI. That incendiary ammunition contains a pyrotechnic material (such as white phosphorus) which is capable of self-ignition and burning or contains a fuze and igniter capable of igniting the main charge.

VII. That the white phosphorus charge used in an incendiary bomb, as in its final form and suitable for its intended purpose, is an incendiary which, as such, is capable of self-ignition and which ignites the napalm or similar gel that may be contained in the bomb.

VIII. That napalm gel in itself is not an incendiary.

132 IX. That napalm gel is merely a gelled mixture of hydrocarbons.

X. That napalm gel has no incendiary characteristics and is not capable of self-ignition or spontaneous combustion.

XI. That a container of napalm gel need not be handled differently from a container of gasoline in the interests of safety and is not considered an incendiary.

(S.) ROBERT W. VAN DOLAH.

Subscribed and sworn to before me, by the affiant above named, this 31 day of March, 1955.

[SEAL] (S.) JOSEPH K. LALOR,
Notary Public.

My commission expires January 7, 1959.

JOSEPH K. LALOR, N. P.

EXHIBIT 3

COUNTY OF NEW YORK, STATE OF NEW YORK, *ss.*

AFFIDAVIT

I, J. D. Sherson, being duly sworn, depose and say:

1. I am a member of the Official Classification Committee, with offices at 1 Park Avenue, New York City.

2. I am empowered to examine the official files of our Committee.

3. I have examined the official files of our Committee and find that on May 4, 1945, Mr. W. S. Flint dictated and had
133 mailed, on behalf of the Official Classification Committee, the following letter:

OFFICIAL CLASSIFICATION COMMITTEE

143 Liberty Street, New York, N. Y.

May 4, 1945.

In your reply refer to WSF 429.

Incendiary Bombs filled with napalm (soap and gasoline).

Commanding Officer,
NY Chem Warfare ProcDiv.,
292 Madison Avenue,
New York, N. Y.

Attention: Lt. W. J. Hanrahan, Transp. Officer.

DEAR SIR: This will acknowledge receipt your letter even date, file SPCYN(T)-471.6 regarding incendiary bombs filled with napalm.

This will confirm advice given to your Mr. Uecker by telephone on November 23, 1943, that these incendiary bombs filled with napalm (soap and gasoline) were ratable by analogy as Empty Aerial Bombs, Item 1895 of the Classification.

Our record indicates that these incendiary bombs consisted of a steel tube containing napalm, but were not a finished bomb in that they needed a powder charge and primer and that they were not dangerous.

Yours truly,

OFFICIAL CLASSIFICATION COMMITTEE,

Member.

jmw.

134 3. The telephone ruling of November 23, 1943, referred to in the May 4, 1945 letter, was in effect at least until June 26, 1945.

(S.) J. D. SHERSON.

Subscribed and sworn to before me this 11th day of April 1955.

[SEAL] (S.) RUTH C. LEITZ,

Ruth C. Leitz,
Notary Public.

Notary Public,
State of New York.
No. 41-2305900
Qualified in Queens County.

Term expires March 30, 1957.

EXHIBIT 4

COUNTY OF NEW YORK, STATE OF NEW YORK, *ss.*

I, Jack A. Dorland, being duly sworn, depose and say:

1. I was a Transportation Officer assigned to the New York Chemical Warfare Procurement District during 1945. I have been shown and have examined a photostat of a letter of May 4, 1945, from the Official Classification Committee addressed to the attention of Lt. W. J. Hanrahan, who was employed in my office under my supervision. That letter states that bomb bodies filled with napalm gel are ratable as Empty Aerial Bombs, Item 1895.

135 2. Mr. Charles H. Uecker, who is mentioned in the second paragraph of the May 4, 1945 letter, was also employed in my office and under my supervision at that time. In November 1943, in the course of Mr. Uecker's official duties it became necessary to ascertain the appropriate classification rating at which bomb bodies filled with napalm gel were to be carried by the railroads. Following the established practice in cases where there is some doubt as to the appropriate classification, Mr. Uecker got in touch with the Official Classification Committee to obtain a ruling from them on the question. He obtained this ruling over the telephone from Mr. Flint, a member of the Official Classfication Committee, on November 23, 1943. The ruling so obtained was to the effect that these steel bomb bodies filled with napalm gel were ratable by analogy as Empty Aerial Bombs, Item 1895.

3. On May 3, 1945, Lt. Hanrahan addressed a letter to the Official Classification Committee to the attention of Mr. Flint, asking the Committee to confirm in writing the fact that the Item 1895 rating applied to napalm filled steel bomb bodies.

This May 3, 1945 letter was signed for me by Lt. W. J. Hanrahan. On the following day, May 4, 1945, the Official Classification Committee responded to the letter of May 3, 1945, and confirmed in writing the fact that steel bomb bodies filled with napalm gel were ratable by analogy as Empty Aerial Bombs,

136 Item 1895. This May 4, 1945 letter is the same letter I referred to in the first paragraph of this Affidavit.

[S.] JACK A. DORLAND.

Subscribed and sworn to before me this 13th day of April 1955.

[S.] GEORGE W. FERGUSON,
George W. Ferguson,
Notary Public, State of New York,
Qualified in Rockland County.

No. 44-1196525

Certificate filed with N. Y. County Clerks and Registrar's office

Commission expires March 30, 1957.

GEORGE W. FERGUSON.

EXHIBIT 5

COUNTY OF NEW YORK, STATE OF NEW YORK, ss.

AFFIDAVIT

I, Charles H. Uecker, being duly sworn, do depose and say:

1. I was an employee of the Department of Army, assigned to the Transportation Division of C. W. S. for the period from 1943 through 1945.

2. My duties in the Transportation Office required me to ascertain under the supervision of the Officer in Charge the ap-
137 propriate classification ratings applicable to shipments of Army materials, whenever there was some doubt as to the proper classfiication.

3. I have been shown and have just examined a copy of a letter of May 4, 1945 from the Official Classification Committee, stating that bomb bodies filled with napalm gel were rated by analogy as Empty Aerial Bombs, Item 1895.

4. I am familar with the circumstances leading to the May 4, 1945 letter: In November 1943, in the course of my official duties in the Division of Transportation, it became necessary for me to ascertain the appropriate classification rating at which these bomb bodies filled with napalm gel were to be carried by the railroads. Following the established practice in such cases, I got in touch with the Official Classification Committee to obtain a ruling from them on the question. I obtained this ruling over the telephone from Mr. Flint, a member of the Official Classification Committee, on November 23, 1943. The ruling so obtained was to the effect that these steel bomb bodies filled with napalm gel were ratable by analogy as Empty Aerial Bombs, Item 1895.

On May 3, 1945, my attention was drawn to the fact that there was nothing in writing confirming the telephone ruling I obtained in November 1943. On May 3, 1945, I accordingly dictated a
138 letter, over Lt. W. J. Hanrahan's signature, addressed to the Official Classification Committee to the attention of Mr. Flint, asking the Committee to confirm in writing the fact that the Item 1895 rating applied to napalm filled steel bomb bodies.

This May 3, 1945 letter was signed by Lt. Hanrahan for Capt. Jack A. Dorland and mailed to the Classification Committee on the same date.

On the following day, May 4, 1945, the Official Classification Committee responded to my letter of May 3, 1945, and confirmed in writing the fact that steel bomb bodies filled with napalm gel were ratable by analogy as Empty Aerial Bombs, Item 1895. This May 4, 1945 letter is the same letter I refer to in the third paragraph of this Affidavit.

[S.] CHARLES H. UECKER.

Subscribed and sworn to before me this 11th day of April 1955.
[SEAL]

[S.] MILTON H. CROSS,
Notary Public State of New York.
No. 52-5865000
Qualified in Suffolk County

Certificates filed with New York County Clerk.

Term expires March 30, 1956.

139 In the United States Court of Claims

No. 42-54

THE WESTERN PACIFIC RAILROAD COMPANY

v.

THE UNITED STATES

No. 104-54

BANGOR AND AROOSTOOK RAILROAD COMPANY

v.

THE UNITED STATES

No. 250-54

SEABOARD AIR LINE RAILROAD COMPANY

v.

THE UNITED STATES

Mr. Lawrence Cake for the plaintiff.

Mr. Morton Hollander, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Martin E. Rendelman* was on the briefs.

OPINION ON PLAINTIFFS' MOTIONS FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT—June 7, 1955

LARAMORE, *Judge*, delivered the opinion of the court:

These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390. A reconsideration of the question of classification of the articles as "bombs or mines" under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case.

140 The Government's contention that these cases should be suspended pending the referral to the Interstate Commerce Commission for a determination as to the reasonableness of the rates, is without merit. The statute of limitations has run against the Government's right to have the reasonableness determined. *A. J. Phillips Company* v. *Grand Trunk Western Railway Company*, 236 U. S. 662; *Midstate Horticultural Co., Inc.* v. *Pennsyl-*

vania Railroad Co., 320 U. S. 356; *United States* v. *Director General*, 80 I. C. C. 143, 150-151; *United States* v. *Southern Railway Company*, 286 I. C. C. 203.

The defendant contends that a question of fact exists as to whether the plaintiffs Bangor and Aroostook Railroad Company and Seaboard Air Line Railroad Company are estopped from claiming the higher rate. The defendant says these plaintiffs are estopped from recovering the higher rate for some of the shipments because the Official Classification Committee, which is "a creation of the railroads," on November 23, 1943, orally and subsequently in writing, informed the Army that the proposed shipments without bursters or fuses were not dangerous and ruled that they should be rated by analogy as empty aerial bombs under item 1895, which was a lower rate than item 1820. This ruling was subsequently rescinded and admitted to be a mistake by the Committee and also by the defendant in the *Union Pacific Railroad* case, *supra*. We do not see how the defendant could reasonably have been misled or injured by the ruling, especially when the plaintiffs promptly billed the defendant at the first-class rate and the defendant paid that rate and continued to make the shipments at that rate. Moreover, the only cases cited by the defendant on the availability of the defense of estoppel to the Government in these railroad cases are *Oregon-Washington Railroad & Navigation Company* v. *United States*, 255 U. S. 339 and *Western Pacific Railroad Company* v. *United States*, 255 U. S. 349. Both of these cases involved the acceptance by the railroad of shipments at the lower rate and gross acquiescence in the shipments at that rate. The Supreme Court held that the railroads were precluded from recovering the higher rate because of their gross acquiescence. There is no acquiescence in these cases. The railroad billed and was paid the higher rate and suit was commenced shortly
141 after the Government set off the sums here in suit against money otherwise due the plaintiffs. See *St. Louis, Brownsville & Mexico Railway Company* v. *United States*, 268 U. S. 169.

Plaintiffs' motions for summary judgment are granted. Judgment will be entered for The Western Pacific Railroad Company in the amount of $14,280.06. Judgment in Bangor and Aroostook Railroad Company and Seaboard Air Line Railroad Company is suspended pending the filing of a stipulation of the exact amount due, or upon failure of filing a stipulation within 45 days the cases will be referred to a commissioner of this court for a report on the amounts due.

It is so ordered.

WHITAKER, *Judge*, and LITTLETON, *Judge*, concur.

MADDEN, *Judge*, dissenting.

"Give a dog a bad name and hang him" is a saying of the people, but it is not a legal maxim. It is hard to think of a name for the inert, non-incendiary objects here involved other than "incendiary bombs." That is what the objects were made for; if they are not used for that purpose they must be scrapped. If a sightseer in a factory asked what those queer-shaped objects were, the answer would be "incendiary bombs." But if he then started to run, he would be given further reassuring information about them.

In law, as in life, words are used for a purpose, and a mere name may be all that is needed in one situation while in another many qualifying words will have to be appended to the name. Where, as in the instant case, the whole reason and justification for charging high rates for the carriage of objects is their incendiary and extra-hazardous character, the mere name is not sufficient to put goods in their proper classification. If we go by the name, our Government and our taxpayers are made to pay for insurance against non-existent risks, and the railroads are getting something for nothing.

In other branches of the law such as laws forbidding the transportation or storage of explosives, a court would make short work of a case involving explosives that would not explode. I see no reason why the law of freight rates should be less rational.

142 "Reason is the life of the law." If the reason for the high freight rate is the incendiary quality of the freight, and if the freight does not have the incendiary quality, the reason for the high rate vanishes and the rate should vanish with it.

The plaintiffs do not attempt to justify the high rates on the basis of high hazards. They simply say, it is so written in the tariffs. Incendiary bombs, high rates. These are incendiary bombs. *Ergo*, high rates. This kind of pure literalism has no place in the law.

I would dismiss the plaintiffs' motion for summary judgment and let the Government prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them. Our *Union Pacific* case is, of course, not *res adjudicata* of this case which involves other plaintiffs. If we should be persuaded in this case that our decision in that case was wrong, we would regret that error, but not repeat it.

JONES, *Chief Judge*, joins in the foregoing dissent.

143 PROCEEDINGS FOLLOWING OPINION OF THE COURT

On July 6, 1955, the defendant filed a motion for rehearing.

On October 4, 1955, the court entered the following order on said motion:

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 and 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this fourth day of October, 1955, that said motions be and the same are overruled as follows:

* * * * * * *

42-54 The Western Pacific Railroad Company
104-54 Bangor and Aroostook Railroad Company
250-54 Seaboard Air Line Railroad Company
Defendant's motion.

* * * * * * *

By the COURT
(S.) MARVIN JONES,
Chief Judge.

144 In the United States Court of Claims

No. 104-54

BANGOR AND AROOSTOOK RAILROAD COMPANY

v.

THE UNITED STATES

ORDER RE JUDGMENT—November 8, 1955

On June 7, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the opinion of the court.

On October 24, 1955, said stipulation was filed signed on behalf of plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General Warren E. Burger, in which it is stated that the amount due plaintiff is $73,056.95.

NOW, THEREFORE, it is ordered this eighth day of November,

1955, that judgment be and the same hereby is entered in favor of plaintiff in the sum of seventy-three thousand fifty-six dollars and ninety-five cents ($73,056.95).

By the COURT
MARVIN JONES,
Chief Judge.

145 In the United States Court of Claims

No. 250-54

SEABOARD AIR LINE RAILROAD COMPANY

v.

THE UNITED STATES

ORDER RE JUDGMENT—November 8, 1955

On June 7, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the opinion of the court.

On October 24, 1955, said stipulation was filed signed on behalf of plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General Warren E. Burger, in which it is stated that the amount due plaintiff is $28,561.93.

NOW, THEREFORE, it is ordered this eighth day of November, 1955, that judgment be and the same hereby is entered for plaintiff in the sum of twenty-eight thousand five hundred sixty-one dollars and ninety-three cents ($28,561.93).

By the COURT
MARVIN JONES,
Chief Judge.

146-147 Clerk's Certificate to foregoing transcript omitted in printing.

148 Supreme Court of the United States

[Title omitted]

ORDER ALLOWING CERTIORARI.—Filed January 23, 1955

The petition herein for a writ of certiorari to the United States Court of Claims is granted and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 376407 9013

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Reasons for granting the writs	8
Conclusion	22
Appendix A	23
Appendix B	25

CITATIONS

Cases:

Addison v. *Holly Hill Co.*, 322 U. S. 607	18
Arizona Sand & Rock Co. v. *Southern Pacific*, 280 I. C. C. 285	14, 18
Austin Powder Co. v. *Wheeling & L. E. Ry. Co.*, 156 I. C. C. 334	20
Bell Potato Chip Co. v. *Aberdeen Truck Line*, 43 M. C. C. 337	14
City of New Orleans v. *Texas & N. O. R. Co.*, 195 F. 2d 882	14
DuPont v. *Davis*, 264 U. S. 456	16
DuPont De Nemours & Co. v. *B. & O. R. R. Co.*, 128 I. C. C. 705	20
Great Northern Ry Co. v. *Merchants Elevator Co.*, 259 U. S. 285	12
Lehigh Valley Railroad Company v. *United States*, Ct. Cls. No. 30–54 (decided November 8, 1955)	9
Midstate Co. v. *Penna. R. Co.*, 320 U. S. 356	15
Mitchell Coal Co. v. *Penna. R. R. Co.*, 230 U. S. 247	14
Nathanson v. *Labor Board*, 344 U. S. 25	14
Northern Pacific Ry. Co. v. *United States*, 213 F. 2d 366	11

368489—55——1

Cases—Continued Page

Phillips v. *Grand Trunk Ry.*, 236 U. S. 662 16
S. S. W., Inc. v. *Air Transport Ass'n of America*, 191 F. 2d 658 14
Seaboard Air Line Railroad Co. v. *United States*, 113 C. Cls. 437, certiorari denied, 338 U. S. 848 ..... 11–12, 17
Smith v. *Hoboken R. Co.*, 328 U. S. 123 14
Rates on Powder and High Explosives, 151 I. C. C. 155 ..... 19, 20
Tank Car Corp. v. *Terminal Co.*, 308 U. S. 422 .. 13
Thompson v. *Texas Mexican R. Co.*, 328 U. S. 134 .. 13
Union Pacific Railroad Co. v. *United States*, 114 C. Cls. 714, certiorari denied, 339 U. S. 930 .. 12
Union Pacific Railroad Company v. *United States*, 125 C. Cls. 390 ..... 6, 12–13, 21
United States v. *Chesapeake & Ohio Railway Company* 224 F. 2d 443, pending on petition for a writ of certiorari 9
United States v. *Director General*, 80 I. C. C. 143 .. 16
United States v. *Kansas City Southern Railway Company*, 217 F. 2d 763 ..... 9–11, 14, 17
United States v. *Morgan*, 313 U. S. 409 14
United States v. *Ruzicka*, 329 U. S. 287 18
United States v. *Southern Railway Company*, 286 I. C. C. 203 16

Statutes and regulation:

Interstate Commerce Act, 24 Stat. 384, as amended, 49 U. S. C. 16 (3) 11, 15, 16, 23
28 U. S. C. 2501 12
49 C. F. R., Parts 71–78 (*Topping's Freight Tariff No. 4*, later *Campbell's Freight Tariff No. 8*) 2, 5

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES, PETITIONER

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, AND SEABOARD AIR LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the Court of Claims entered in the above cases on June 7, 1955 and November 8, 1955.

OPINION BELOW

The opinion of the Court of Claims in all three cases (App. B, pp. 25–29) is reported at 131 F. Supp. 919.

JURISDICTION

The judgment of the Court of Claims in *Western Pacific* was entered on June 7, 1955 (App. B,

p. 28). On the same date, entry of judgments in the *Bangor* and *Seaboard* cases was suspended pending determination of the exact amounts due (App. B, p. 28). A timely motion for rehearing in all three cases was denied by the Court of Claims on October 4, 1955 (App. B, p. 30). On November 8, 1955, the Court of Claims, after determination of the exact amounts due, entered judgments in *Bangor* and *Seaboard* (App. B, pp. 31, 32). The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16 (3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether the high, first-class tariff rates on explosive and incendiary bombs, which are intended to reimburse carriers for the heavy and unusual transportation expenses resulting from the necessity that such bombs be carried in accordance with the Interstate Commerce Commission Regulations on "Explosives and Other

Dangerous Articles," apply to steel bomb cases when these cases are filled with non-incendiary, non-explosive, and non-hazardous material and are *not* subject to the Regulations.[1]

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C. 1 *et seq.*, are set out in Appendix A, *infra*, pp. 23–24.

STATEMENT

These actions were brought in the Court of Claims by respondent rail carriers to recover the difference between tariff rates actually paid and those allegedly applicable to 211 Government shipments of steel bomb cases filled with Napalm gel. About 200 of the shipments were made over the lines of respondents Bangor and Seaboard in 1944 (R. 75, 101–102). The remaining shipments were over respondent Western Pacific's lines in 1948 and 1950 (R. 5, 23). The record in these cases discloses the following pertinent facts:[2]

Napalm gel is gasoline which has been thickened or gelatinized by the addition of aluminum soap powders (R. 48, 53, 163). This mixture is not capable of spontaneous combustion, is not self-

[1] If certiorari is granted, we wish to reserve the right to brief and argue the additional question whether respondents Bangor and Seaboard were estopped from claiming that the high, first-class rates applied to the shipments over their lines. See R. 100–109.

[2] All record references are to the pages of the certified transcript filed in the office of the Clerk.

igniting, and is not, therefore, incendiary (R. 163–165); like wood, paper, and a host of other articles, it will burn if ignited, but some outside incendiary agent must be supplied to set it on fire (R. 163, 168).

In a completed incendiary bomb, capable of functioning as such, the incendiary agent which ignites the Napalm gel is contained in the burster charge (R. 163, 164, 168). The burster is a steel tube inserted in the nose of a bomb and extending through its center, which contains a column of explosive TNT and a column of white phosphorous (R. 24, 49). The function of the explosive is to rip open the steel bomb case and scatter its contents (R. 24). The white phosphorous is the incendiary or self-igniting agent, which ignites in the air when blasted out by the explosive charge and sets the Napalm gel on fire (R. 24). In addition, a complete incendiary bomb contains a fuze. The fuze is a device in the nose of the bomb which, on impact, sets off a primer cup with a small explosion sufficient to fire the burster (R. 24). The burster and fuze represent more than 75% of the construction cost of a complete bomb, whereas the steel case and Napalm filler comprise less than 25% of the cost (R. 49).

It is undisputed that the shipments involved contained neither the burster nor the fuze and that they therefore did not contain either the incendiary element, i. e., the white phosphorous,

or the explosive element, i. e., the TNT (R. 5, 14, 83, 93). The only bomb parts shipped, as already noted, were the steel cases filled with gasoline which had been thickened by the addition of aluminum soap powders for the purpose of retarding the gasoline's free-flowing qualities (R. 46, 51, 164).

These steel bomb cases filled only with Napalm gel were similar to a "steel container filled with gasoline, with the exception that the Napalm gel filling does not flow as readily as gasoline and if ignited does not burn as rapidly as gasoline" (R. 164). Indeed, a "bomb body filled with Napalm Gel * * * presents considerabl[y] less hazard in transit, from a transportation viewpoint, than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline" (R. 46). In light of these facts, the Bureau of Explosives, which enforces the Interstate Commerce Commission's Regulations on "Explosives and Other Dangerous Articles" (49 C. F. R., Parts 71–78, published as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tariff No. 8*), has consistently ruled that a Napalm-filled bomb case, shipped, as here, without fuze or burster, is "not a dangerous article or an explosive article" subject to the Regulations and hence is "not required to be shipped in accordance with the * * * regulations" (R. 64, 65, 67).

The Government, claiming that the tariff rates for the shipments in question should be the same fifth-class rates applicable to gasoline in steel drums or containers, paid the carriers on that basis (R. 2, 72, 87). The carriers, asserting that the proper rates were the high, first-class rates established by Item 1820 of the Freight Classification for a complete incendiary or explosive bomb,[3] filed their petitions in 1954 in the Court of Claims to recover the difference (R. 1, 71, 85).

The Government's answers, claiming that Item 1820 is inapplicable, denied that any additional sums were due respondents (R. 7, 77, 89). Respondents then moved for summary judgment, relying on *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390, and asserting that the facts and issues in that case and in the instant ones were identical (R. 11, 81, 91). Opposing these motions, the Government submitted uncontroverted affidavits to show the non-applicability of Item 1820 (R. 45–69, 110–113, 161–175).

[3] The Official Classification Committee, a railroad organization which authors and publishes the Consolidated Freight Classifications and assigns classification ratings, had ruled, as early as November 1943, in response to a request from the Army, that the high, first-class rates of Item 1820 do not apply to shipment of bomb cases filled only with Napalm gel because such shipments "were not a finished bomb in that they needed a powder charge and primer and that they were not dangerous" (R. 170). This ruling was in effect during the 200 shipments in 1944 in the *Bangor* and *Seaboard* cases and remained "in effect at least until June 26, 1945" (R. 171).

The Government took the further position that, if the court below was nevertheless of the view that Item 1820 applied, there was then presented a question of reasonableness of the application of these high, first-class rates to the non-hazardous shipments involved (R. 37–38). The Government, on this aspect of the case, urged the court to suspend the proceedings and allow that question to be referred to and determined by the Interstate Commerce Commission as the only body empowered to pass on the reasonableness of railroad tariff rates (R. 38).

The Court of Claims, dividing three to two, adhered to its *Union Pacific* ruling and held that Item 1820 applied (App. B, p. 26). In addition, while recognizing the "Government's right to have the reasonableness determined" by the Interstate Commerce Commission, the court held that the running of the two-year statute of limitations destroyed that right (App. B, p. 26). The court accordingly granted the carriers' motions for summary judgment and entered judgments of $14,280.06 for Western Pacific, $73,056.95 for Bangor, and $28,561.93 for Seaboard (App. B, pp. 28, 31, 32).

The dissent of Judge Madden, in which Chief Judge Jones joined, stated that the majority's opinion results from the "kind of pure literalism ha[ving] no place in the law" (App. B, p. 29). The dissent noted that "the whole reason and justification for charging high rates for the carriage of

objects is their incendiary and extra-hazardous character;" that the carriers "do not attempt to justify the high rates [demanded by them here] on the basis of high hazards;" and that, under the court's judgment, "our Government and our taxpayers are made to pay for insurance against non-existent risks, and the railroads are getting something for nothing" (App. B, pp. 28, 29).

REASONS FOR GRANTING THE WRITS

While ruling that the two-year limitation period of Section 16 (3) of the Interstate Commerce Act, App. A, pp. 23–24, does not bar suits by carriers against the United States for additional transportation charges, the Court of Claims has held in the instant cases that the running of the same two-year period deprives the Government of its right to referral of the issue of the rates' reasonableness to the Interstate Commerce Commission, concededly the only body authorized to pass thereon. Since the Government is thus prevented from asserting the unreasonableness of the rates as a defense, the effect of the holding below is that, at the same time that the Government is deprived of the benefit of the two-year limitation as a shield to ward off the carriers' suits, the carriers are free to invoke the provision as a sword to destroy the Government's right to establish its defense on the merits. Not only is there nothing in the Act or its history to indicate a congressional intent to achieve such a grossly

uneven result, but the holding below is in square conflict with *United States* v. *Kansas City Southern Railway Company,* 217 F. 2d 763 (C. A. 8). This limitations question is a recurring one[4] and the holding below has important bearing on numerous pending and prospective suits.

In the circumstances, we believe it appropriate that the Court also review the related question whether the Court of Claims erred in construing the tariffs. That court's construction—one which requires the Government "to pay for insurance against non-existent risks" (dissenting opinion, App. B, p. 29)—not only leads to carrier windfalls of approximately $115,000 in the instant cases; applied to other carriers of similar shipments, it will confer windfalls estimated by the General Accounting Office at more than $20,000,000.

1. The holding below that referral to the Interstate Commerce Commission for a determination as to reasonableness of the tariff rates was precluded because of the expiration of the two-year limitation period provided in Section 16 (3) of the Interstate Commerce Act is in square conflict with *United States* v. *Kansas City Southern Ry.*

[4] The same issue is presented in *United States* v. *Chesapeake & Ohio Railway Company*, 224 F. 2d 443 (C. A. 4), in which a petition for a writ of certiorari is being filed concurrently. See, also, *Lehigh Valley Railroad Company* v. *United States*, Ct. Cls. No. 30–54 (decided November 8, 1955), where, in a situation identical to that in the present cases, the Court of Claims again refused referral to the Interstate Commerce Commission and granted the carrier's motion for summary judgment.

Co., 217 F. 2d 763 (C. A. 8). In the *Kansas City Southern* case, the Government had brought an action to recover alleged overcharges in connection with the transportation of export grain. The District Court, determining that the carrier had charged the established tariff rate and that the validity of the Government's claim depended upon the resolution of administrative questions, dismissed the suit. The Government thereupon filed a motion to set aside the order of dismissal and to hold the case in abeyance until the resolution of those questions could be obtained from the Commission. The motion was denied.

Accepting the District Court's view as to the administrative nature of the questions involved, the Eighth Circuit vacated the dismissal and remanded the cause for such further proceedings as the District Court might deem appropriate to obtain the necessary Commission determination. Noting that "[a]ny right to resort to the Interstate Commerce Commission as a matter of independent and plenary proceeding clearly would now be wholly barred [by limitations],"[5] the court observed that only by holding the action in abeyance and submitting the administrative questions to the Commission would the public treasury be protected (217 F. 2d at 769). In its petition for rehearing, the carrier protested the sanctioning of a referral on the ground, among others, that the two

[5] The transportation services had been rendered between April 1945 and August 1946.

years provided in Section 16 (3) had run. In denying rehearing, the Eighth Circuit once again laid stress upon the propriety of a referral after the limitations period had run, reiterating (217 F. 2d at 770) that this circumstance

> * * * had left the situation where the Interstate Commerce Commission now was without any power under the statute to grant reparation relief in an administrative proceeding, and that the only way therefore that it presently was possible to safeguard such public interest as might be involved would be "by a holding of the present action in abeyance and allowing the administrative questions to be submitted to the Interstate Commerce Commission for answer, on the basis of their incidence in the judicial proceeding."[6]

The *Kansas City Southern* case was pressed upon the Court of Claims (see R. 42); the court below, however, refused to accept the Eighth Circuit's holding and ruled to the contrary.

2. Despite the fact that Section 16 (3) states no exceptions, the Court of Claims has consistently held that the two-year limitation period established thereby does not apply to suits brought by carriers against the United States. *Seaboard Air*

[6] See also *Northern Pacific Ry. Co.* v. *United States*, 213 F. 2d 366 (C. A. 8). It is significant that in that case, where the two-year period provided in Section 16 (3) had also run, the Court of Appeals *sua sponte* directed referral; neither party to the proceeding had made a request for referral at any stage.

Line Railroad Co. v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U. S. 848; *Union Pacific Railroad Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U. S. 930.[7] This ruling, which was not challenged in the instant cases because of the prior decisions, opened the way to consideration of the claims against the United States here asserted by respondents. Now, the Court of Claims has ruled that the very two-year limitation period which is inapplicable to these carrier actions brought against the United States nonetheless inhibits the Government in defense of these suits.

It cannot be denied that if the Government could establish the unreasonableness of the rates demanded by the carriers it would constitute a complete defense on the merits. Nor can it be challenged that the determination of such a question of reasonableness is within the exclusive province of the Interstate Commerce Commission. See, *e. g., Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. The court below has itself fully recognized, in *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390,

[7] Under these decisions the only limitation period applicable to carriers' suits against the United States is the general six-year period provided in the Tucker Act. 28 U. S. C. 2501. The instant actions, while filed after expiration of Section 16 (3)'s two-year period, were filed within the six-year period.

involving similar shipments of Napalm-filled bomb bodies, that (125 C. Cls. at 394)

> * * * [t]his [reasonableness] question is not within our jurisdiction, however, as *the question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission.* [Emphasis supplied.]

Similarly, a long line of decisions by this Court and the lower courts firmly establishes the need for a court to stay its hand when, in the course of litigation, there arises an issue appropriate for determination only by the Commission. Thus, in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 147, which involved a question appropriate for Commission determination, the Court declared:

> * * * in a long line of cases beginning with *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, *the court should stay its hand until the Commission has passed on the matter.* * * * *That course is singularly appropriate here.* [Emphasis supplied.]

Again, in a comparable case, *Tank Car Corp.* v. *Terminal Co.*, 308 U. S. 422, 433, the Court stated:

> When it appeared in the course of the litigation that an administrative problem,

> committed to the [Interstate Commerce] Commission, was involved, *the court should have stayed its hand pending the Commission's determination* of the lawfulness and reasonableness of the practice under the terms of the Act. *There should not be a dismissal, but, as in Mitchell Coal Co.* v. *Pennsylvania R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding.* [Emphasis supplied.]

Accord: *Smith* v. *Hoboken R. Co.,* 328 U. S. 123; *Mitchell Coal Co.* v. *Penna. R. R. Co.,* 230 U. S. 247, 267; *City of New Orleans* v. *Texas & N. O. R. Co.,* 195 F. 2d 882, 887 (C. A. 5); *S. S. W., Inc.* v. *Air Transport Ass'n of America,* 191 F. 2d 568, 664 (C. A. D. C.); *United States* v. *Kansas City Southern Railway Company,* 217 F. 2d 763, 770 (C. A. 8); *Arizona Sand & Rock Co.* v. *Southern Pacific,* 280 I. C. C. 285; *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M. C. C. 337, 343; see also *Nathanson* v. *Labor Board,* 344 U. S. 25, 30; *United States* v. *Morgan,* 313 U. S. 409, 422.

On the basis of these settled principles, the Government, raising a question of reasonableness in the instant proceedings, moved to stay the proceedings pending a referral of the question to the Commission. The court below, however, brushed aside the motion, holding that Section 16 (3)'s two-year "statute of limitations has run

against the Government's right to have the reasonableness determined" (App. B, p. 26).[8]

The unfairness and incorrectness of this holding are manifest. Since Section 16 (3), as construed by the court below, allows a carrier to file suit after the two-year period has expired, and since in such a suit the United States cannot, under the holding below, establish the defense of unreasonableness because of the expiration of the same two-year period, it is obvious that any carrier seeking to collect charges which are unreasonable and in violation of the Interstate Commerce Act may do so with impunity by merely waiting the two years before filing suit.

Nothing in Section 16 (3) compels such an uneven result. Nor do any of the four decisions relied on by the court below furnish any support for the court's holding. *Midstate Co.* v. *Penna.*

[8] While the court's opinion does not in express terms refer to Section 16 (3)'s two-year limitation period, it is plain from the four cases cited by the court on that question (App. B, p. 26) and from the arguments of respondents below (R. 136, note 4) that the court had in mind the two-year period of Section 16 (3). Respondents asserted in the court below, relying on the same four cases later cited in the court's opinion, that the court lacked authority to refer the question of reasonableness to the Commission because "Sec. 16 (3) (b) and (e) of the Interstate Commerce Act, Title 49 U. S. Code" requires that proceedings "must be filed with the Commission within two years after delivery of the shipments" (R. 136, note 4).

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R. Co., 320 U. S. 356, simply holds that Section 16 (3)'s limitation period bars a carrier's action action against *a private shipper*, even though the shipper agreed to waive the bar. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, applies the limitation period to bar a suit by a *private shipper* against a carrier. These cases, which were concerned with actions between private shippers and carriers, do not touch the issue here. There was, of course, no occasion to consider the peculiar position in which the United States, as a shipper, has been placed by the Court of Claims' determination that Section 16 (3)'s limitation period applies to a carrier's action against all shippers *except the United States.*

The two Interstate Commerce decisions, holding that the United States may not institute an independent reparation proceeding against a carrier after the two-year period has expired (*United States* v. *Director General*, 80 I. C. C. 143, 150–151; *United States* v. *Southern Railway Company*, 286 I. C. C. 203), do not support the result below. While we believe that those Commission decisions are unsound,* it is sufficient to point out that

*It is doubtful that the limitation provision in Section 16 (3) is to be applied against the United States, proceeding as complainant, in the absence of express language making the limitation applicable to the sovereign. Cf. *DuPont* v. *Davis*, 264 U. S. 456, 462, in which this Court held the provisions of Section 16 (3) inapplicable to a suit to recover demurrage charges accruing during a period of federal control of the railroads on the ground that the

the question here was not whether the United States is barred from filing an independent reparation proceeding against the carrier before the Commission but whether the court was barred from exercising its power to refer the question of reasonableness to the Commission, as an incident to a judicial proceeding timely filed before it and brought *against* the United States by the carrier.

Furthermore, far from justifying a refusal to refer, the Commission's rulings, if they are to be given effect, underscore the need for such a reference. As the Eighth Circuit pointed out in the *Kansas City Southern* case, *supra,* p. 11, the presumed unavailability of an independent ad-

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action was on behalf of the United States. It is also to be noted that the rationale of the Court of Claims' holdings that the carriers are not bound by the two-year term in suing the United States would compel equally the conclusion that the United States is not subject to that limitation in proceeding against carriers. The rationale of the Court of Claims was stated in *Seaboard Air Line R. Co.* v. *United States*, 113 C. Cls. 437, 447, as follows:

"The Transportation Act of 1940 and its predecessors were general statutes regulating commerce generally. Its provisions had to do with various and sundry aspects of commerce both on the land and the sea. The carriage of government property and the mail was dealt with, but Congress was chiefly concerned with the carriers' relationship to each other and with the private shipper. This was the subject uppermost in the mind of Congress when the Acts were passed. We feel reasonably confident that when Congress said a carrier must bring its suit for its charges within two years, it did not have in mind suits against the Government."

ministrative remedy reinforced the need for the court below to stay its hand and refer the reasonableness question to the Commission as an incident of the judicial proceeding. See also *Arizona Sand & Rock Co.* v. *Southern Pacific Co.*, 280 I. C. C. 285.[10]

Finally, a reference in such circumstances gives effect to the basic precept that courts and administrative agencies are "collaborative instrumentalities of justice." *United States* v. *Ruzicka*, 329 U. S. 287, 295; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 620–622. The power of the courts

[10] In the *Arizona* case, the carrier instituted suit in the United States District Court for the District of Arizona to collect demurrage charges on shipments of cement. The shipper contended the charges were inapplicable and unreasonable. By order of the court, the proceedings were stayed to permit a determination by the Commission as to the issues raised by the respective parties. The matter was thereupon referred to the Commission, where the carrier interposed the defense that the limitation provisions of Section 16 of the Interstate Commerce Act had run as to some of the services in controversy. The Commission agreed that the limitation period had run but rejected the defense, noting that "it is the practice of the Commission to assist the court in instances of the kind stated in [its] order" and that "[a]ppropriate findings and a declaratory order in proceedings such as this are authorized by section 5 (d) of the Administrative Procedure Act" (280 I. C. C. at 286). Accordingly, it passed upon all of the questions posed by the court's order, made the appropriate determinations, and transmitted a certified copy of its report based thereon to the District Court for the latter's guidance.

generally is available in order to enable the administrative agency to function effectively in carrying out congressional policies. The prohibition against unreasonable railroad charges in the Interstate Commerce Act is an explicit declaration of basic congressional policy. Accordingly, the power of the court below to refer the "reasonableness" question should have been exercised so as to enable the Commission to carry out that policy. Otherwise, the United States in this case and in all other cases in which the carrier postpones filing suit until after expiration of the two-year period will be deprived of its right to obtain a determination over which the Commission has exclusive jurisdiction and which, if obtained, would enable the Government to establish a complete defense to the suits.

3. The application by the court below of the high, first-class rates of Item 1820 to the shipments here involved misconceives the basic purpose of those rates. The high, first-class rate applicable to explosives and other dangerous articles under Item 1820 has traditionally been based on the consideration that the transportation of such articles is "attended with great risk," that "heavy expenses are incurred [by the carriers] in conforming to [the I. C. C.] regulations," and that the "first class" rate is therefore the proper rate "to apply on this traffic." *Rates on Powder and*

High Explosives, 151 I. C. C. 155, 163; *Austin Powder Co.* v. *Wheeling & L. E. Ry. Co.,* 156 I. C. C. 334, 337; *DuPont De Nemours & Co.* v. *B. & O. R. R. Co.,* 128 I. C. C. 705, 706. There is, however, no great risk nor tremendous potential liability attendant upon the transportation of the relatively safe Napalm-filled bomb bodies involved in the present cases. And the carriers do not incur any "heavy expense" in transporting the non-explosive and non-incendiary Napalm-filled bomb bodies because concededly they are *not* subject to the I. C. C. Regulations and hence are free from the strict packing, marking, loading, and handling requirements imposed by the Regulations. *Supra,* p. 5. Application of Item 1820 to these shipments thus forces the Government to reimburse the carriers for "heavy expenses" they do not incur, and, as Judge Madden's dissent observes, "our Government and our taxpayers are made to pay for insurance against non-existent risks, and the railroads are getting something for nothing" (App. B, p. 29).

The fact that applying Item 1820 to the shipments here involved would compensate the carriers for additional expenses which they have not in fact incurred is, of course, pertinent to the question of the reasonableness of such a rate application. But it is also relevant to the question of tariff interpretation, for, like any other instru-

ment, a tariff is to be read in the light of its known purposes and in a manner which avoids unnecessary and gross unfairness."[11]

Here, there is no obstacle to such a reading. It appears from the terms of Item 1820, the related provisions in the Freight Classification, and from the uncontroverted affidavits in the record, that "in order for an article to be rated" under Item 1820, "it must be an article which itself is subject to regulation under *Topping's Tariff I. C. C. No. 4.* These regulations are promulgated by the Interstate Commerce Commission and are published in the Code of Federal Regulations at 49 C. F. R., Parts 71–78" as the Commission's Regulations on "Explosives and other Dangerous Articles" (R. 57, 63). Since Napalm-filled bomb cases are *not* subject to the Regulations, it follows from the terms of Item 1820 that, contrary to the holding below, they should not be classified under the first-class rates of Item 1820.

[11] Application of the Item 1820 rate here would be manifestly unfair. Indeed, respondents have not even challenged that unfairness and do not attempt to justify the high rates on the basis of high hazards (R. 183). Furthermore, the plain implication of an earlier opinion of the court below in another Napalm-filled bomb body case was that application of the Item 1820 rate to the type of shipment here involved would be unfair. *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390, 393, 394.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
MELVIN RICHTER,
MORTON HOLLANDER,
Attorneys.

DECEMBER 1955.

APPENDIX A

The Interstate Commerce Act, § 16 (3) (24 Stat. 384, as amended, 49 U. S. C. 16 (3)), provides in pertinent part:

> (a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the Carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.
>
> (d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for

recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

* * * * *

APPENDIX B

1. Opinion of the Court of Claims in the *Western Pacific, Bangor,* and *Seaboard* Cases and Judgment of the Court in the *Western Pacific* Case

In the United States Court of Claims

(Decided June 7, 1955)

No. 42–54

The Western Pacific Railroad Company

v.

The United States

No. 104–54

Bangor and Aroostook Railroad Company

v.

The United States

No. 250–54

Seaboard Air Line Railroad Company

v.

The United States

Mr. Lawrence Cake for the plaintiff.

Mr. Morton Hollander, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for the defendant. *Mr. Martin E. Rendelman* was on the briefs.

ON PLAINTIFFS' MOTIONS FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

LARAMORE, *Judge,* delivered the opinion of the court:

These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390. A reconsideration of the question of classification of the articles as "bombs or mines" under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case.

The Government's contention that these cases should be suspended pending the referral to the Interstate Commerce Commission for a determination as to the reasonableness of the rates, is without merit. The statute of limitations has run against the Government's right to have the reasonableness determined. *A. J. Phillips Company* v. *Grand Trunk Western Railway Company,* 236 U. S. 662; *Midstate Horticultural Co., Inc.* v. *Pennsylvania Railroad Co.,* 320 U. S. 356; *United States* v. *Director General,* 80 I. C. C. 143, 150–151; *United States* v. *Southern Railway Company,* 286 I. C. C. 203.

The defendant contends that a question of fact exists as to whether the plaintiffs Bangor and Aroostook Railroad Company and Seaboard Air Line Railroad Company are estopped from claiming the higher rate. The defendant says these plaintiffs are estopped from recovering the higher rate for some of the shipments because the Official

Classification Committee, which is "a creation of the railroads," on November 23, 1943, orally and subsequently in writing, informed the Army that the proposed shipments without bursters or fuses were not dangerous and ruled that they should be rated by analogy as empty aerial bombs under item 1895, which was a lower rate than item 1820. This ruling was subsequently rescinded and admitted to be a mistake by the Committee and also by the defendant in the *Union Pacific Railroad* case, *supra.* We do not see how the defendant could reasonably have been misled or injured by the ruling, especially when the plaintiffs promptly billed the defendant at the first-class rate and the defendant paid that rate and continued to make the shipments at that rate. Moreover, the only cases cited by the defendant on the availability of the defense of estoppel to the Government in these railroad cases are *Oregon-Washington Railroad & Navigation Company* v. *United States,* 255 U. S. 339 and *Western Pacific Railroad Company* v. *United States,* 255 U. S. 349. Both of these cases involved the acceptance by the railroad of shipments at the lower rate and gross acquiescence in the shipments at that rate. The Supreme Court held that the railroads were precluded from recovering the higher rate because of their gross acquiescence. There is no acquiescence in these cases. The railroad billed and was paid the higher rate and suit was commenced shortly after the Government set off the sums here in suit against money otherwise due the plaintiffs. See *St. Louis, Brownsville & Mexico Railway Company* v. *United States,* 268 U. S. 169.

Plaintiffs' motions for summary judgment are granted. Judgment will be entered for The Western Pacific Railroad Company in the amount of $14,280.06. Judgment in Bangor and Aroostook Railroad Company and Seaboard Air Line Railroad Company is suspended pending the filing of a stipulation of the exact amount due, or upon failure of filing a stipulation within 45 days the cases will be referred to a commissioner of this court for a report on the amounts due.

It is so ordered.

WHITAKER, *Judge,* and LITTLETON, *Judge,* concur.

MADDEN, *Judge,* dissenting.

"Give a dog a bad name and hang him" is a saying of the people, but it is not a legal maxim. It is hard to think of a name for the inert, non-incendiary objects here involved other than "incendiary bombs." That is what the objects were made for; if they are not used for that purpose they must be scrapped. If a sightseer in a factory asked what those queer-shaped objects were, the answer would be "incendiary bombs." But if he then started to run, he would be given further reassuring information about them.

In law, as in life, words are used for a purpose, and a mere name may be all that is needed in one situation while in another many qualifying words will have to be appended to the name. Where, as in the instant case, the whole reason and justification for charging high rates for the carriage of objects is their incendiary and extra-hazardous character, the mere name is not sufficient to put goods in their proper classification. If we go by

the name, our Government and our taxpayers are made to pay for insurance against nonexistent risks, and the railroads are getting something for nothing.

In other branches of the law such as laws forbidding the transportation or storage of explosives, a court would make short work of a case involving explosives that would not explode. I see no reason why the law of freight rates should be less rational. "Reason is the life of the law." If the reason for the high freight rate is the incendiary quality of the freight, and if the freight does not have the incendiary quality, the reason for the high rate vanishes and the rate should vanish with it.

The plaintiffs do not attempt to justify the high rates on the basis of high hazards. They simply say, it is so written in the tariffs. Incendiary bombs, high rates. These are incendiary bombs. *Ergo,* high rates. This kind of pure literalism has no place in the law.

I would dismiss the plaintiffs' motion for summary judgment and let the Government prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them. Our *Union Pacific* case, is, of course, not *res adjudicata* of this case which involves other plaintiffs. If we should be persuaded in this case that our decision in that case was wrong, we would regret that error, but not repeat it.

JONES, *Chief Judge,* joins in the foregoing dissent.

2. ORDER OF THE COURT OF CLAIMS DENYING THE MOTION FOR REHEARING IN THE *Western Pacific, Bangor,* AND *Seaboard* CASES

ORDER

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 and 54 of the Rules of this court and, on consideration thereof,

It is ordered this fourth day of October, 1955, that said motions be and the same are overruled as follows:

* * * * *

42–54 The Western Pacific Railroad Company.
104–54 Bangor and Aroostook Railroad Company.
250–54 Seaboard Air Line Railroad Company. Defendant's motion.

* * * * *

By the COURT:

(S) Marvin Jones,
MARVIN JONES,
Chief Judge.

3. Judgment of the Court of Claims in the *Bangor* Case

In the United States Court of Claims

No. 104–54

Bangor and Aroostook Railroad Company

v.

The United States

ORDER

On June 7, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the opinion of the court.

On October 24, 1955, said stipulation was filed signed on behalf of plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General Warren E. Burger, in which it is stated that the amount due plaintiff is $73,056.95.

Now, therefore, it is ordered this eighth day of November, 1955, that judgment be and the same hereby is entered in favor of plaintiff in the sum of seventy-three thousand fifty-six dollars and ninety-five cents ($73,056.95).

By the Court:

Marvin Jones, *Chief Judge.*

4. Judgment of the Court of Claims in the *Seaboard* Case

In the United States Court of Claims

No. 250–54

Seaboard Air Line Railroad Company
v.
The United States

ORDER

On June 7, 1955, the court rendered an opinion holding that plaintiff was entitled to recover but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the opinion of the court.

On October 24, 1955, said stipulation was filed signed on behalf of plaintiff by its attorney of record and on behalf of the defendant by Assistant Attorney General Warren E. Burger, in which it is stated that the amount due plaintiff is $28,561.93.

Now, therefore, it is ordered this eighth day of November, 1955, that judgment be and the same hereby is entered for plaintiff in the sum of twenty-eight thousand five hundred sixty-one dollars and ninety-three cents ($28,561.93).

By the Court:

Marvin Jones, *Chief Judge.*

U. S. GOVERNMENT PRINTING OFFICE: 1955

FILED
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~559~~ 18

UNITED STATES, *Petitioner,*

v.

THE WESTERN PACIFIC RAILROAD COMPANY,
BANGOR AND AROOSTOOK RAILROAD COMPANY,
SEABOARD AIR LINE RAILROAD COMPANY,
Respondents.

On Petition for Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS IN OPPOSITION

LAWRENCE CAKE
RAYMOND A. NEGUS
1001 Connecticut Avenue,
N. W.
Washington 6, D. C.
Counsel for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Questions Presented

1. Whether the court below erred, on the record and in the circumstances of these cases, in refusing to order a "referral" of these cases to the Interstate Commerce Commission or in refusing to stay action to enable the Government to take the cases to the Commission 2, 3

2. Whether steel bomb bodies filled with incendiary gels, without bursters and fuzes, should be classified and rated as Incendiary Bombs, or as combination articles (Rule 18 of the freight classification) or as analogous to dummy bombs or other articles of the 5th class 3, 11

Reply to "Reasons for Granting the Writs"

1. There is no conflict between the Court of Claims and other courts which this court is called upon to resolve 15

2. The decision of the Court of Claims does not misconstrue Section 16(3) of the Interstate Commerce Act and is in accord with the decisions of this court and the Interstate Commerce Commission 17

3. The decisions of the Court of Claims in these cases, and in the Union Pacific case, 125 C. Cls. 390, are correct 20

Conclusion

A review by this court of the judgments in these cases is not justified, on either of the questions stated 23

The basic reason for seeking a review of the judgments in these cases is to obtain a review of the decision of the Court of Claims in an earlier case, 125 C. Cls. 390, in which certiorari was not sought by the Government 23

CASES CITED

Page

American Railway Express Co. v. Price Bros., 54 F. (2d) 67 7
Anaconda Copper Co. v. Chicago & Erie R. Co., 19 I.C.C. 592 9
Arizona Sand & Rock Co. v. Southern Pacific Co., 280 U. S. 285 9
Atchison, T. & S. F. R. Co. v. United States, 74 C. Cls. 154 7
Atchison, T. & S. F. R. Co. v. United States, 81 C. Cls. 346 7
Atchison, T. & S. F. R. Co. v. United States, 97 C. Cls. 271 7
Atchison, T. & S. F. R. Co. v. United States, 123 C. Cls. 127 7
Consolidated Classification Case, 262 I.C.C. 508 20
Crancer v. Lowden, 315 U. S. 631 8
Erie R. Co. v. United States, 79 C. Cls. 102 7
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U. S. 427 8
Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285 6
Heid Bros. v. El Paso & Northeastern R. Co., 55 I.C.C. 416 6
J. G. Falls & Co. v. Chicago, R. I. & P. R. Co., 15 I.C.C. 269 6
Kansas City Southern R. Co. v. Wolf, 261 U. S. 133 .. 18
Louisville Cement Co. (U. S. ex rel.) v. Interstate Commerce Commission, 246 U. S. 638 9
Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U. S. 356 18
Mitchell Coal Co. v. Pennsylvania R. Co., 230 U. S. 247 8
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U. S. 246 ..... 9, 21
Motor Cargo Inc. v. United States, 129 C. Cls. 493 7
Northwestern School Supply Co. v. D. L. & W. R. Co., 140 I.C.C. 543 9
Pennsylvania R. Co. v. Fox & London, 93 F. (2d) 669.. 6
Pennsylvania R. Co. v. United States, 70 C. Cls. 276... 7
Pennsylvania R. Co. v. United States, 129 C. Cls. 781.. 7
Phillips v. Grand Trunk W. R. Co., 236 U. S. 667 18
RFC v. Spokane, P. & S. R. Co., 170 F. (2d) 96 7

Page

Seaboard Air Line R. Co. v. United States, 113 C. Cls. 437 18
Southern Pacific Co. v. United States, 62 C. Cls. 391... 18
Southern Pacific Co. v. United States, 128 C. Cls. 773.. 4
Texas & Pacific R. Co. v. Sonken-Galamba Corp., 100 F. (2d) 158 6
Thompson, Trustee v. Texas Mexican R. Co., 328 U. S. 124 8
Union Pacific R. Co. v. United States, 114 C. Cls. 714.. 18
Union Pacific R. Co. v. United States, 117 C. Cls. 534.. 7
Union Pacific R. Co. v. United States, 125 C. Cls. 390, 126 C. Cls. 947 .....1, 3, 14, 21
United States v. Chesapeake & Ohio R. Co., 224 F. (2d) 443 16
United States v. Director General, 80 I.C.C. 143 .....8, 18
United States v. Gulf Refining Co., 268 U. S. 542 14
United States v. Kansas City Southern R. Co., 217 F. (2d) 763 15
United States v. Lindsay, 346 U. S. 568 19
United States v. Munsingwear, 340 U. S. 36 23
United States v. Southern R. Co., 286 I.C.C. 203 .....8, 18
War Materials Reparation Cases, 294 I.C.C. 5.....8, 10, 13
Williams v. United States, 289 U. S. 553 23

STATUTES CITED

Sec. 835, Criminal Code, Title 18, U. S. Code 14
Sec. 2501, Title 28, U. S. Code 17, 19
Sec. 16(3), Interstate Commerce Act, Title 49, U. S. Code 17, 18, 19
Sec. 22, Interstate Commerce Act, Title 49, U. S. Code 13
Sec. 66, Title 49, U. S. Code 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 559

UNITED STATES, *Petitioner,*

v.

THE WESTERN PACIFIC RAILROAD COMPANY,
BANGOR AND AROOSTOOK RAILROAD COMPANY,
SEABOARD AIR LINE RAILROAD COMPANY,
Respondents.

On Petition for Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENTS IN OPPOSITION

The basic reason for the petition for certiorari in these cases is that the Government wants to obtain a belated review by this court of the decision of the Court of Claims in an earlier case, *Union Pacific R. Co.* v. *United States,* 125 C. Cls. 390, in which the

Government did not apply for certiorari. In that case the Court of Claims held that steel bomb bodies filled with incendiary gels, without bursters and fuzes, were properly classified and rated as incendiary bombs. In these cases in which review is now sought the Government stipulated that the issue was the same and that unpaid balances on their freight bills were due the respondents on the basis of the decision in the *Union Pacific* case. The respondents moved for summary judgment. The court below granted the motions and entered judgments for the respondents. The Government asks this court to review those judgments, urging that the decision of the Court of Claims on the issue stated was wrong, that at all events the court should have stayed action and referred these cases to the Interstate Commerce Commission for a determination of the reasonableness of the classification and rating of the articles in question as incendiary bombs, and that in refusing to do so the court misconstrued Section 16(3) of the Interstate Commerce Act.

QUESTIONS PRESENTED

The statement in the petition for certiorari of the questions presented distorts the decision of the Court of Claims and is inaccurate and misleading. A fair statement of the questions which the Government seeks to have reviewed is:

1. Whether the court below erred, on the record and in the circumstances of these cases, in refusing to order a "referral" of these cases to the Interstate Commerce Commission or in refusing to stay action to enable the Government to take the cases to the Commission.

2. Whether steel bomb bodies filled with incendiary gels, without bursters and fuzes, should be classified and rated as incendiary bombs, or as combination articles consisting of bomb bodies, gasoline, and soap powder or other chemicals, or in the alternative as analogous to dummy bombs or other articles of the 5th class.

First Question

Any discussion of this question requires a short statement with respect to the earlier case on which the court's decision in these cases was based, *Union Pacific R. Co.* v. *United States,* 125 C. Cls. 390, as well as a statement of the issue made in these cases and the court's decision which the Government is asking this court to review.

In the *Union Pacific* case the question submitted and decided was whether articles described as incendiary bombs, NP or PT1 filled, without bursters and fuzes, should be classified and rated as incendiary bombs, or—as the Government contended—as combination articles consisting of bomb bodies, gasoline, and soap powder or other chemicals, or in the alternative as analogous to dummy bombs or other articles of the 5th class. 125 C. Cls. 390, at page 392.[1]

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[1] The findings of fact, 125 C. Cls. 394-400, show that the plaintiff's bills for the transportation charges on the shipments in question were stated on the basis of classification as incendiary bombs and were originally paid by the Government as billed. Later, upon audit by the General Accounting Office overpayments were determined and deductions were made from other bills to recover the overpayments. The Union Pacific thereupon sued to recover the resulting underpayments on their bills for the service in question.

The *Union Pacific* case was tried and argued by the Government on the theory that the Napalm and PT1 gels were not incendiary because not self-igniting, therefore steel bomb bodies filled with Napalm and PT1, without bursters and fuzes, were not incendiary bombs. At the trial of the case witnesses were called by both parties and numerous documentary exhibits were received in evidence. The court made a finding of fact that the gels although highly inflammable were not self-igniting, but also found that the bomb bodies when filled with the gels had no purpose or use except as incendiary bombs, and concluded that the plaintiff was entitled to recover, stating in the opinion:

> "We are of the opinion that when a steel bomb body, such as the M76 or M47 A2, is filled with an incendiary gel, such as PT1 or NP, it is an incendiary bomb, regardless of whether it contains a burster and fuze. While the absence of the burster and fuze admittedly renders the shipment of the article less hazardous from a transportation standpoint, the only logical description of such an article is as an incendiary bomb. The articles as described on the bills of lading were incendiary bombs without bursters and fuzes, and they had no purpose or use except as incendiary bombs."

The *Union Pacific* case was decided on April 7, 1953, on the issue of liability, 125 C. Cls. 390. Final judgment was entered on November 3, 1953, 126 C. Cls. 947. There was no application for certiorari.[2]

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[2] In a similar case, *Southern Pacific Company* v. *United States*, 128 C. Cls. 773, judgment was entered on a stipulation of the parties agreeing to settlement on the basis of the decision in the *Union Pacific* case.

In the three cases under submission in which the Government is asking for writs of certiorari, the record shows:

1. In the *Western Pacific* case, a stipulation at pretrial conference that the shipments in question were "shipments of articles described as incendiary bombs without fuses and bursters, being like the articles transported in the *Union Pacific* case No. 49505, previously decided by this court on April 7, 1953" and that on the basis of the court's decision in the *Union Pacific* case there was a balance due the plaintiff of $14,280.06. (R. 12-13)
2. In the *Bangor & Aroostook* case, admissions in the response to the plaintiff's statement of facts for admission that the shipments in question were M47 bombs, NP filled, without bursters and fuzes, that the transportation charges had been settled and paid by the General Accounting Office on the basis of classification of the articles shipped as combination articles under Rule 18 of the freight classification and the rates applicable thereto, and that on the basis of the court's decision in the *Union Pacific* case there was due the plaintiff a balance of $73,056.95. (R. 82-83)
3. In the *Seaboard* case, admissions similar to those made in the Bangor & Aroostook case, and that on the basis of the court's decision in the *Union Pacific* case there was due the plaintiff a balance of $28,561.93. (R. 92-93)

In each case the plaintiff (respondent here) moved for judgment on the pleadings or for summary judgment under Rule 51 of the Court of Claims (R. 11, 81, 91).

The court below granted the plaintiffs' motions for summary judgment, and said in the opinion:

> "These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390. A reconsideration of the question of classification of the articles as "bombs or mines" under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case."

On the further argument that at all events the court should stay action pending a "referral" to the Interstate Commerce Commission for a determination of the reasonableness of the rates claimed and found to be applicable, the court said:

> "The Government's contention * * * is without merit. The statute of limitations has run against the Government's right to have the reasonableness determined."

(A) On the record in these cases the court did not err in refusing to refer them to the Commission. The Commission of course has no jurisdiction of the respondents' claims against the Government for the unpaid charges on their bills.[3] It is well settled that the courts have jurisdiction in such cases. *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U.S. 285; *Pennsylvania R. Co.* v. *Fox & London,* 93 F. (2nd) 669; *Texas & Pacific R. Co.* v. *Sonken-Galamba*

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[3] *J. G. Falls & Co.* v. *Chicago R. I. & P. R. Co.,* 15 I.C.C. 269; *Heid Bros.* v. *El Paso and Northeastern R. Co.,* 55 I.C.C. 416. The only remedy which carriers have for undercharges and underpayments of their freight bills is in the courts.

Corporation, 100 F. (2nd) 158; *American Railway Express Co.* v. *Price Brothers,* 54 F. (2nd) 67; *RFC* v. *Spokane, P. & S. R. Co.,* 170 F. (2nd) 96.

The Court of Claims has been called upon in many cases to decide disputes over the classification of an article or commodity or the applicable rates. *Pennsylvania R. Co.* v. *United States,* 70 C. Cls. 276 (surgical bandages); *Atchison, T. & S. F. R. Co.* v. *United States,* 74 C. Cls. 154 (airplane pontoons); *Erie Railroad Co.* v. *United States,* 79 C. Cls. 102 (bomb sights); *Union Pacific R. Co.* v. *United States,* 117 C. Cls. 534 (jeeps); *Motor Cargo, Inc.* v. *United States,* 129 C. Cls. 493 (machine gun parts). In other cases the Court of Claims has construed and applied the published tariffs and has decided whether or not the plaintiff has been paid in full for the service performed. *Atchison, T. & S. F. R. Co.* v. *United States,* 81 C. Cls. 346 (minimum carload weights), 97 C. Cls. 271 (station index numbers), 123 C. Cls. 127 (switching charges); *Pennsylvania R. Co.* v. *United States,* 129 C. Cls. 781 (transit allowances).

On the record in these cases under submission the Court of Claims was bound to conclude that the respondents had not been paid in full for the service performed, on the basis of the applicable freight classification and rates, and were entitled to recover the balances claimed.

The decisions of this court cited in the petition for certiorari, as authority for a referral of these cases to the Commission, did not involve the reasonableness of classifications or rates. They involved special situations and questions such as the reasonableness and lawfulness of allowances to shippers in reduction of

their freight bills, *Mitchell Coal Co. v. Pennsylvania R. Co.*, 230 U.S. 247, the reasonableness and lawfulness of payments for the use of privately owned tank cars, *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422, and questions of trackage rights and contracts, abandonments, and the reorganization of railroads under the Bankruptcy Act, *Thompson, Trustee* v. *Texas Mexican R. Co.*, 328 U.S. 124.

Compare *Crancer* v. *Lowden*, 315 U.S. 631.

(B) On the record in these cases the Court of Claims did not err in refusing to stay action to enable the Government to take the cases to the Commission on the issue of the reasonableness of the freight classification and the applicable rates. The Commission has no jurisdiction of any complaint by the Government that the applicable charges on these shipments were unjust and unreasonable. *United States* v. *Director General*, 80 I.C.C. 143, 150-151; *United States* v. *Southern Railway Co.*, 286 I.C.C. 203; *War Materials Reparation Cases*, 294 I.C.C. 5, 12.

The position of the Government, it must be assumed, is that the Commission although lacking jurisdiction to award reparation on a complaint now filed by the Government may make "findings" that the applicable rates and charges on these shipments were unjust and unreasonable, and thus enable the Government not only to defeat the respondents' claims for the unpaid balances due on their freight bills, but also enable the General Accounting Office to use the Commission's findings—if made as the Government wants them made—as the basis for a determination

of overpayments and consequent cutbacks and deductions from other bills without any limitation whatever.

The suggestion that the Commission may make "findings" although lacking jurisdiction to award reparation has been rejected by the Commission. *Anaconda Copper Mining Co.* v. *Chicago & Erie R. Co.*, 19 I.C.C. 592, 594. In *United States ex rel Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U.S. 638, this court quoted with approval the decision of the Commission cited and a similar statement in the Commission's report in the case under review, as follows:

> "We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion."

In *Northwestern School Supply Co.* v. *D. L. & W. Ry.*, 140 I.C.C. 543, the Commission said:

> "As the allegation of unreasonableness was not made until more than two years after the shipments moved, that issue is barred."

It is true that in a more recent case, *Arizona Sand & Rock Co.* v. *Southern Pacific Co.*, 280 I.C.C. 285, the Commission gave consideration to such a reference from a federal district court on the ground that it is authorized by Section 5 (d) of the Administrative Procedure Act, but the assumption on which that action was based and the notion that the Commission may properly do so was dispelled by the subsequent decision of this court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, in

which this court held that the district court lacked power to refer a case to the Federal Power Commission for findings as to the reasonableness of past rates where the Federal Power Commission lacked power to award reparation. In the opinion of this court it was said:

> "If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the [Federal Power] Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly."

Finally, it should be noted that in the *War Materials Reparation Cases,* 294 I.C.C. 5, decided February 7, 1955, the Commission considered seventeen complaints filed by the Government that the rates and charges for handling Government freight during the war years from 1941 to 1946 were unjust and unreasonable (including two cases, Docket Nos. 29822 and 29861, which involved ammunition, explosives, and ammunition components). In those cases which were consolidated for hearing and decision the Commission found and concluded that the rates and charges paid by the Government were "in the aggregate considerably lower than they would have been on commercial shipments between the same points" and

that the defendants (the railroads) were not shown to have violated the Interstate Commerce Act in respect of such rates, charges, and practices.[4]

On the first question stated, therefore, there is no justification, on the record and in the circumstances of these cases, for referring these cases to the Commission or for staying action to enable the Government to take them to the Commission on the issue of the reasonableness of the classification and the applicable rates.[5]

Second Question

2. Whether steel bomb bodies filled with incendiary gels, without bursters and fuzes, should be classified and rated as incendiary bombs, or as combination articles consisting of bomb bodies, gasoline, and soap powder or other chemicals, or as analogous to dummy bombs or other articles of the 5th class.

This question goes to the merits of the dispute between the respondents and the General Accounting Office. The statement of the question in the petition for certiorari is inaccurate and misleading because it includes unsupported and erroneous assumptions and because it misapprehends the issue which was tried and decided in the *Union Pacific* case—the same issue

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[4] A petition filed by the Government for rehearing and reconsideration is pending.

[5] There was no dissent in the court below on this issue. The dissenting opinion in these cases expressed dissatisfaction with the decision that the articles in question should be classified as incendiary bombs and would have permitted the Government to re-try the issue decided in the *Union Pacific* case—whether the articles in question were in fact incendiary bombs.

which the Government has stipulated is involved in these cases.

The supporting statement of the petition for certiorari (pages 3-8) is equally misleading because it is based—not on the trial record in the *Union Pacific* case, or on any findings of fact in these cases, but on erroneous assumptions and *ex parte* affidavits.[6] When these *ex parte* affidavits were filed there was no statement as to why the affiants were not called or could not have been called as witnesses, subject to cross examination, at the trial of the *Union Pacific* case. At that trial the Government called an expert witness, from the Army Chemical Center, who stated the same opinion. He also testified that he would not call the article in question a tube of gel and that he would call it an incendiary bomb without burster or igniter; and on cross examination, that the NP and PT1 gels were invariably referred to as incendiary gels and were so described in the Army technical manual on air chemical munitions.

The reference in the statement of the second question presented and elsewhere in the petition for certiorari (pp. 2, 6, 7, 19, 21) to the "high, first-class tariff rates" on incendiary bombs is not only improper because irrelevant but also because it is wrong in fact. *First,* it is irrelevant whether the pub-

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[6] All references in the petition for certiorari to R. 45-67 are to *ex parte* affidavits filed in opposition to the plaintiffs' motions for summary judgment in these cases. The affidavits were offered to support the argument that there was a genuine issue of fact in these cases. The gist of the affidavits is that in the opinion of the affiants Napalm gel is not incendiary because not self-igniting, therefore bomb bodies filled with Napalm gel are not incendiary bombs.

lished and applicable rates—on any articles or commodities—are high or low; the reasonableness of the rates is a matter for the Interstate Commerce Commission. *Second,* Item 1820 of the Consolidated Freight Classification did not quote any rates on incendiary bombs. It provided a classification or "rating" for incendiary bombs (first-class). The applicable rates were to be found in the rate tariffs or Section 22 quotations in effect at the time of movement and between the points of origin and destination. Besides the class rate tariffs which would be applicable in the absence of any published lower rates or Section 22 quotations, there are many tariffs of exceptions to the class rates, there are commodity rates which are invariably lower than the class rates, and there are often lower rates quoted to the Government under Section 22 of the Interstate Commerce Act. *Third,* it is a fact well known to the Department of Justice that during the war period and subsequently all ammunition, explosives, and ammunition components were handled by the railroads for the Government under Section 22 agreements at approximately 65 percent of first-class rates, without land-grant deductions. *War Materials Reparation Cases,* 294 I.C.C. 5, 137-146. In the Commission's report, page 139, it is stated that during the period included in the complaints the ratings on these commodities generally ranged from Class 32½ to Class 75,[1] and that in Mountain-Pacific territory and transcontinental territory commodity rates prevailed to an important extent; that at the request of the War Department the railroads made a Section 22 quotation of Class 65 on ammunition and explosives in carloads, minimum 50,000 pounds, appli-

[1] Percentages of first-class.

cable throughout the United States, not subject to land-grant deductions, and that the quotation appeared to have been reasonably satisfactory to the Government officials chiefly concerned until some time in 1945.[8]

The reference in the statement of the second question presented, and elsewhere in the petition for certiorari, to the regulations on Explosives and Other Dangerous Articles is irrelevant on the issue in the *Union Pacific* case and in these cases. The regulations are those prescribed by the Commission pursuant to Section 835, Title 18, U. S. Code, for the safe transportation of explosives and other dangerous articles. The regulations have no bearing on questions of the application of the published rates on such articles, *United States* v. *Gulf Refining Co.,* 268 U.S. 542, 550.

The reference to non-hazardous material in the statement of the second question presented and the statement elsewhere in the petition for certiorari that the respondents "do not attempt to justify the high rates on the basis of high hazards" are irrelevant on the issue in these cases. It would be improper for the respondents in these cases, or in any case in the Court of Claims, "to justify" the *reasonableness* of the published rates (or Section 22 agreed rates) claimed. To do so would be to convert the hearing by the court of a transportation case—which can only properly involve the question of the application of the published or agreed rates—into an Interstate Commerce Commission case for the determination of just and reasonable

[8] The complaints in the War Materials Reparation Cases were filed at various dates from 1946 to 1948 by attorneys for the Government acting under the direction of the Attorney General.

rates. The Court of Claims in exercising its jurisdiction and in deciding whether the respondents have been paid in full for the service in question cannot properly consider and decide whether the applicable rates (published or agreed) are reasonable or unreasonable. The remedy for an unreasonably high rate or classification (assuming it is unreasonably high) is with the Commission, not the courts.

On the second question stated in the petition for certiorari, it is clear that the decisions of the Court of Claims in the *Union Pacific* case:

> "We are of opinion that when a steel bomb body, such as the M76 or M47 A2, is filled with an incendiary gel, such as PT1 or NP, it is an incendiary bomb, regardless of whether it contains a burster and fuze."

and in these cases:

> "A reconsideration of the question of classification of the articles as 'bombs or mines' under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion."

are sound.

REASONS STATED FOR GRANTING THE WRITS

1. It is said that the refusal of the Court of Claims to direct a "referral" of these cases to the Interstate Commerce Commission is in conflict with *United States* v. *Kansas City Southern R. Co.*, 217 F. (2nd) 763. The *Kansas City Southern* case was first decided by the Circuit Court of Appeals for the 8th Circuit on November 19, 1954, 217 F. (2nd) 763. The judgment of the district court dismissing the complaint was vacated and the case was remanded "for such further

proceedings, on the present record or otherwise, as the District Court may deem appropriate." On rehearing, 217 F. (2nd), 769, the Circuit Court of Appeals adhered to its former opinion and ordered the mandate to issue. Judge Collett dissented and filed a dissenting opinion, 217 F. (2nd) 777. We submit that the dissenting opinion of Judge Collett correctly states the law. At all events, on the remand of the case to the District Court the latter reconsidered the matter and overruled the plaintiff's motion (the United States) for a stay pending administrative determination, and concluded:

> "Plaintiff, on the merits, is not entitled to recover any damages of defendant as here claimed. Therefore, judgment is now entered herein, on the merits, in favor of the defendant and against the plaintiff. Plaintiff's complaint is accordingly ordered dismissed."
>
> Order, June 14, 1955, in *United States* v. *Kansas City Southern Railway Co.,* in the United States District Court for the Western District of Missouri, Western Division, No. 5254.

The *Kansas City Southern* case therefore creates no conflict which this court is called upon to resolve.

It may be noted that on the same question of staying action in cases involving the collection by carriers of their transportation charges, pending a reference to the Commisison of the question of the reasonableness of such charges, the Circuit Court of Appeals for the 4th Circuit, in *United States* v. *Chesapeake & Ohio R. Co.,* 224 F. (2nd) 443, on July 14, 1955, affirmed a judgment of the District Court which denied the Government's motion to stay proceedings pending a reference to the Commission, and said:

> "Furthermore, as we pointed out in the prior case, it would not have been a reasonable exercise of discretion to stay proceedings pending action by the Commission where all parties before the court were barred by limitations from asking such action. The court has power to stay proceedings before it pending action by the Commission, but not to refer to the Commission proceedings which the Commission is without power to entertain."

In the *Chesapeake & Ohio* case, cited above, a petition for certiorari was filed by the Government on December 9, 1955, and is now before this court, No. 560, October Term 1955.

2. It is said that the Court of Claims has misconstrued Section 16(3) of the Interstate Commerce Act. In the discussion of this point in the petition for certiorari the reference is simply to Section 16(3) without any distinction between the several subsections, (a) to (h). The sub-sections to which the petition for certiorari presumably refers are (a) and (b).

Subsection (a) provides that all actions at law by carriers for recovery of their charges, or any part thereof shall be begun within two years from the time the cause of action accrues, and not after. The Court of Claims in these cases was not called upon to give any consideration to subsection (a) because it has long been settled that when a carrier performs transportation service for the Government and is compelled to sue in the Court of Claims for its charges or for unpaid balances on its freight bills the applicable limitation period is the six years prescribed by Section 2501, Title 28, U.S. Code, and not Section 16 (3) (a) of the Interstate Commerce Act. This was decided as long

ago as 1926 in *Southern Pacific Co.* v. *United States,* 62 C. Cls. 391. The question was reconsidered in *Seaboard Air Line R. Co.* v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U.S. 848; and again in *Union Pacific R. Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U.S. 930.

Subsection (b) provides that all complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after. Such complaints would include charges of unreasonableness or other violations of Section 1 of the Act. In *United States* v. *Director General,* 80 I.C.C. 143, and *United States* v. *Southern Railway Co.,* 286 I.C.C. 203, the Commission held that the Government as a shipper is bound by that limitation and the Commission has no jurisdiction of a complaint filed by the Government more than two years after the accrual of the right of action.

In *Phillips* v. *Grand Trunk Western R. Co.,* 236 U.S. 662, and *Kansas City Southern R. Co.* v. *Wolf,* 261 U.S. 133, which involved claimed overcharges, this court held that Section 16(3) is jurisdictional and that the lapse of time destroys the liability as well as bars the remedy. The same rule applies to undercharges, *Midstate Horticultural Co.* v. *Pennsylvania R. Co.,* 320 U.S. 356.

In the cases under submission the Court of Claims, citing the above cases, held that the Government's right to apply to the Interstate Commerce Commission for a determination of the reasonableness of the charges claimed by the respondents and found applicable on the shipments in question is barred.

The petition (page 12) suggests that the Court of Claims has absolved the carriers from the two years limitation of (a) of Section 16(3) on their claims against the Government for undercharges (by giving effect to Section 2501, Title 28, U. S. Code), and at the same time has held the Government to the two years limitation prescribed by (b) of Section 16(3) on the filing of complaints with the Commission for damages not based on overcharges, and thus "inhibits the Government in the defense of these suits." Subsection (b) of Section 16(3) does not inhibit the Government in the defense of suits in the Court of Claims because that subsection refers to complaints for damages not based on overcharges. It does not refer to undercharges and overcharges which are the only claims of which the Court of Claims has jurisdiction. Those are claims of the carriers for undercharges, and claims of the Government—by way of counterclaim—for overcharges. The carriers' right to claim undercharges is limited by Section 2501, Title 28, U. S. Code, and such claims must be filed within six years from the accrual of the right of action. The Government's claims for overcharges, on the other hand, are not subject to any limitation because there is no statute which prescribes any limitation on such claims.[9] The Government may interpose claims for overcharges by way of counterclaim whenever a carrier sues for undercharges, or the General Accounting Office at any time may make deductions from other bills to recover overpayments on earlier bills (Section 66, Title 49, U. S. Code).

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[9] Congress has unquestioned power to bar recovery on Government claims if it sees fit. E.g., Section 4(c) of the Act of June 29, 1948, 62 Stat. 1070; *United States* v. *Lindsay*, 346 U.S. 568.

It is clear that the decision of the Court of Claims in these cases involves no misconstruction of Section 16(3) of the Interstate Commerce Act and is in accord with the decisions of this court and the Commission.

3. The third reason stated for granting the writs in these cases is a reiteration of the argument that the Court of Claims decided these cases—and the previous *Union Pacific* case—wrongly. This argument has been answered, pages 11-15 above, in replying to the Government's statement of the questions presented. To a large extent the Government relies on the dissenting opinion of Judge Madden and particularly to the statements that "the whole reason and justification for charging high rates for the carriage of [these] objects is their incendiary and extra-hazardous character" and that "the plaintiffs do not attempt to justify the high rates on the basis of high hazards." These statements are unsupported by anything in the record or otherwise. The making of freight classifications and rates which are just and reasonable, all of which is subject to regulation by the Interstate Commerce Commission, is not so simple a matter. There are many things—in addition to hazard—considered by the rate makers and by the Commission in determining whether rates and classifications are just and reasonable. Transportation characteristics such as weight and bulk per cubic foot, value per pound, packaging, the likelihood of loss, damage, or pilferage, the cost of handling or of protection, the volume of movement, are some of the considerations. Commercial and trade conditions, ratings on analogous articles, and competition between railroads, between localities, between manufacturers, and between articles used for similar purposes, may be important factors. In a case called the *Consolidated*

Classification case, 262 I.C.C. 508-509, the Commission said:

> "The primary purpose of a freight classification is to assign each article, or a group of articles, to a class according to well-known classification principles or elements which recognize distinctions from a transportation standpoint, along fairly broad lines, in order to meet the needs of commerce. None of the principles or elements should be controlling, but all that are relevant should be considered."

The suggestion that the respondents should "justify" the reasonableness of the published rates (or Section 22 agreed rates) claimed and found to be applicable has already been answered, pages 14-15 above. To attempt in any case to "justify" the rates found to be applicable would be to convert the hearing by the Court of Claims of a transportation case—which can only properly involve the question of the application of the published or agreed rates—into an Interstate Commerce Commission case for the determination of just and reasonable rates.

The following quotation from the opinion of this court in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251, although in a federal power case applies equally to cases which involve questions of the reasonableness of freight rates and the jurisdiction of the courts and the Interstate Commerce Commission:

> "But the problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered, and the District Court, in undertaking to exercise that

power, both regard reasonableness as a justiciable legal right rather than a criterion for administrative application determining a lawful rate. Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.

"Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one."

CONCLUSION

In short, there is no justification for asking this court to review the judgments of the Court of Claims in these cases, on either of the two questions stated or for the reasons stated.

It is also apparent that the basic reason for seeking the writs of certiorari in these cases is to obtain a review by this court of the decision of the Court of Claims in the *Union Pacific* case, 125 C. Cls. 390. The Government did not apply for certiorari in that case and the judgment became final and conclusive. *Williams* v. *United States,* 289 U. S. 553, 564; *United States* v. *Munsingwear,* 340 U. S. 36. In these cases the Government has stipulated that the issue is the same and that unpaid balances on their freight bills are due the respondents on the basis of the decision in the *Union Pacific* case in the amounts stated. On the record in these cases the Court of Claims reconsidered that decision and came to the same conclusion and entered judgments for the respondents in the amounts stipulated.

Although the parties in these cases and in the *Union Pacific* case are different and the judgment in the latter is not properly *res judicata* in these cases, the following statement by this Court in *United States* v. *Munsingwear* 340 U. S. 36, 41, is apposite:

> "The case is therefore one where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself. The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation."

Respectfully submitted,

LAWRENCE CAKE
RAYMOND A. NEGUS
Counsel for Respondents

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	4
Summary of argument	10
Argument:	
Introduction	12
I. The two-year limitation period of Section 16 of the Interstate Commerce Act does not bar the Government's right to have the "reasonableness" question determined by the Interstate Commerce Commission	15
A. The United States had a right to referral of the "reasonableness" issue whether or not the Government is subject to a two-year period of limitations when filing an independent claim with the Interstate Commerce Commission	16
B. The United States is not, in any event, subject to the limitations provisions of Section 16(3)	25
II. The court below erred in holding that, as a matter of law, the high first-class tariff rates apply to the shipments involved	27
III. The Court of Claims erroneously denied the Government its right to determination of the issue of estoppel	35
Conclusion	42
Appendix	43

CITATIONS

Cases:

Addison v. *Holly Hill Co.*, 322 U.S. 607	23
Arizona Sand & Rock Co. v. *Southern Pacific*, 280 I.C.C. 285	18, 23, 24
Assets Service Corp. v. *United States*, 121 C.Cls. 308	28

Cases—Continued

	Page
Austin Powder Co. v. *Wheeling & L. E. Ry. Co.*, 156 I.C.C. 334	34
Bell Potato Chip Co. v. *Aberdeen Truck Line*, 43 M.C.C. 337	18
Board of Commissioners v. *United States*, 308 U.S. 343	26
Campana Corp. v. *Harrison*, 135 F. 2d 334	28
Central R.R. Co. of New Jersey v. *United States*, 60 C.Cls. 578, certiorari dismissed, 270 U.S. 644	13
Chappell v. *Goltsman*, 186 F. 2d 215	28
City of New Orleans v. *Texas & N. O. R.Co.*, 195 F. 2d 882	18
Davis v. *Corona Coal Co.*, 265 U.S. 219	26
DuPont de Nemours & Co. v. *Davis*, 264 U.S. 456	26, 27
DuPont de Nemours & Co. v. *B. & O. R. R. Co.*, 128 I.C.C. 705	34
Fountain v. *Filson*, 336 U.S. 681	28
Gifford v. *Travelers Protective Ass'n*, 153 F. 2d 209	28
Great Northern Ry. Co. v. *Merchants Elevator Co.*, 259 U.S. 285	16
Guaranty Trust Co. v. *United States*, 304 U.S. 126	26
Illinois Steel Co. v. *B. & O. R. Co.*, 320 U.S. 508	38
Kansas City Southern R. Co. v. *Wolf*, 261 U.S. 133	21
L. & N. R. R. v. *Central Iron Co.*, 265 U.S. 59	38
Lancaster v. *United States*, 60 C. Cls. 80	13
Midstate Co. v. *Penna. R. Co.*, 320 U.S. 356	20, 21
Mitchell Coal Co v. *Penna R. R. Co.*, 230 U.S. 247	18
Montana-Dakota Co. v. *Pub. Serv. Co.*, 341 U.S. 246	24
N. Y. Cent. R.R. v. *York & Whitney Co.*, 256 U.S. 406	38
Nathanson v. *Labor Board*, 344 U.S. 25	18
Northern Pac. Ry. Co. v. *United States*, 59 C. Cls. 122	13
Northern Pacific Ry. Co. v. *United States*, 213 F. 2d 366	22
Oregon-Wash. R. R. Co. v. *United States*, 255 U.S. 339	12, 39
Phillips v. *Grand Trunk Ry.*, 236 U.S. 662	20, 21
Pittsburgh, &c. Ry. Co. v. *Fink*, 250 U.S. 577	38
Ramsouer v. *Midland Valley R. Co.*, 135 F. 2d 101	28
Rates on Powder and High Explosives, 151 I.C.C. 155	34
S. S. W., Inc. v. *Air Transport Ass'n of America*, 191 F. 2d 658	18
Sartor v. *Arkansas Gas Corp.*, 321 U.S. 620	28
Schaff v. *United States*, 59 C. Cls. 318	13

Cases—Continued

Page

Seaboard Airline Railroad Co. v. *United States*, 113 C.Cls. 437, certiorari denied, 338 U.S. 848..... 13
Seaboard Surety Co. v. *Racine Screw Co.*, 203 F. 2d 532 28
Slagle v. *United States*, 228 F.2d 673..... 28
Smith v. *Hoboken R. Co.*, 328 U.S. 123..... 18
Southern Pac. Co. v. *United States*, 62 C. Cls. 391..... 13
Tank Car Corp. v. *Terminal Co.*, 308 U.S. 422..... 17
Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134..... 17
Traylor v. *Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213. 28
Union Pacific R.R. Co. v. *United States*, 114 C.Cls. 714, certiorari denied, 339 U.S. 930 13
Union Pacific Railroad Co. v. *United States*, 117 C.Cls. 534 8
Union Pacific Railroad Co. v. *United States*, 117 C.Cls. 757 ..... 34, 35, 42
Union Pacific Railroad Co. v. *United States*, 125 C.Cls. 390 ..... 5, 7, 17, 35, 41
Union Transfer Co. v. *Riss & Co.*, 218 F. 2d 553..... 28
United States v. *Director General*, 80 I.C.C. 143..... 21
United States v. *Kansas City Southern Railway Co.*, 217 F. 2d 763 ..... 16, 18, 21
United States v. *Morgan*, 313 U.S. 409..... 18
United States v. *Nashville &c. Ry. Co.*, 118 U.S. 120.... 26
United States v. *Ruzicka*, 329 U.S. 287..... 23
United States v. *Southern Railway Co.*, 286 I.C.C. 203 21
United States v. *Summerlin*, 310 U.S. 414..... 26
United States v. *Whited & Wheless*, 246 U.S. 552..... 26
Vale v. *Bonnett*, 191 F. 2d 334 28
Wabash Ry. Co. v. *United States*, 59 C.Cls. 322, affirmed, 270 U.S. 1 13
Western Pac. R.R. Co. v. *United States*, 59 C.Cls. 67, reversed on other grounds, 268 U.S. 271..... 13
Western Pac. R. R. Co. v. *United States*, 255 U.S. 349... 39
Western Traffic Assn.—Agreement, 276 I.C.C. 183..... 8

Statutes and Regulations:

	Page
Act of September 18, 1940, Sec. 322, 54 Stat. 955, 49 U.S.C. 66	4, 20, 40
Interstate Commerce Act, 24 Stat. 379, 49 U.S.C. 1 *et seq.*:	
Sec. 6(7)	38
Sec. 9	23, 25
Sec. 16	25
Sec. 16(3)	2, 3, 9, 10, 11, 12, 13, 14, 15, 18, 19, 22, 27
Sec. 22	38
Tucker Act, 28 U.S.C. 2501	10, 13
Interstate Commerce Commission Regulations on "Explosives and Other Dangerous Articles," 49 C.F.R., Parts 71-78, published as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tariff No. 8*	6, 32, 33

Miscellaneous:

Court of Claims Rule 51(d)	28
F.R.C.P., Rule 56(c)	28
H. Rep. No. 1217 on S. 2009, 76th Cong., 1st Sess., p. 28	40
H. Rep. No. 3250, 81st Cong., 2d Sess.	6
3 Pomeroy, *Equity Jurisprudence* (5th ed. 1941), Sec. 805	37
Wilson, *Transportation and Communication* (1954) pp. 144-147	8
Wiprud, *Justice in Transportation* (1945) pp. 78-80	8

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 18

UNITED STATES, PETITIONER

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, AND SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 84) is reported at 132 C. Cls. 115, and 131 F. Supp. 919.

JURISDICTION

The judgment of the Court of Claims in *Western Pacific* was entered on June 7, 1955 (R. 85). On the same date, entry of judgments in the *Bangor* and *Seaboard* cases was suspended pending determination of the exact amounts due (R. 85). A timely motion for rehearing in all three cases was denied by the Court

of Claims on October 4, 1955 (R. 87). On November 8, 1955, the Court of Claims, after determination of the exact amounts due, entered judgments in *Bangor* and *Seaboard* (R. 87, 88). The petition for a writ of certiorari was filed on December 9, 1955, and was granted on January 23, 1956 (R. 89). 350 U.S. 953. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the expiration of the two-year limitation period of Section 16(3) of the Interstate Commerce Act, while not barring suits by common carriers against the United States, nonetheless precluded referral to the Interstate Commerce Commission for a determination as to the reasonableness of the tariff rates demanded by the carriers, thus preventing the Government from establishing the unreasonableness of those tariff rates as a complete defense to the suits.

2. Whether the high, first-class tariff rates on explosive and incendiary bombs, which are intended to reimburse carriers for the heavy and unusual transportation expenses resulting from the necessity that such bombs be carried in accordance with the Interstate Commerce Commission Regulations on "Explosives and Other Dangerous Articles," apply to steel bomb cases which are *not* subject to the Regulations because they are filled with non-incendiary, non-explosive, and non-hazardous material.

3. Whether respondents Bangor and Seaboard are estopped from claiming that the high, first-class rates applied to the shipments over their lines.

STATUTES INVOLVED

The Interstate Commerce Act, § 16(3) (24 Stat. 384, as amended, 49 U.S.C. 16(3)), provides in pertinent part:

> (a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.
>
> (b) All complaints against carriers subject to this part for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d).
>
> (c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this part within two years from the time the cause of action accrues, and not after, subject to subdivision (d), except that if claim for the overcharge has been presented in writing to the Carrier within the two-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.
>
> (d) If on or before expiration of the two-year period of limitation in subdivision (b) or of the two-year period of limitation in subdivision (c) a carrier subject to this part begins action under subdivision (a) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be ex-

tended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carier, and not after.

* * * * *

Act of September 18, 1940, § 322 (54 Stat. 955, 49 U.S.C. 66), provides:

Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

STATEMENT

These actions were brought in the Court of Claims by the three respondent rail carriers to recover the difference between tariff rates actually paid and those allegedly applicable to 211 Government shipments of steel bomb cases filled with Napalm gel. Approximately 200 of the shipments were made over the lines of respondents Bangor and Seaboard in 1944 (R. 23-43, 54-61). The remaining shipments were over respondent Western Pacific's lines in 1948 and 1950 (R. 1-3, 5-6).

The record, which consists primarily of pleadings and affidavits, discloses the following pertinent facts:

Napalm gel is gasoline which has been thickened or gelatinized by the addition of aluminum soap powders (R. 8, 10, 11, 13). This mixture is not capable of spontaneous combustion, is not self-igniting, and is not, therefore, incendiary (R. 8, 9, 10, 12, 13, 76-78, 79); like wood, paper, and a host of other articles, it will burn if ignited, but some outside incendiary agent must be supplied to set it on fire (R. 9, 10-11, 12, 13, 76-78, 79).

In a completed incendiary bomb, capable of functioning as such, the incendiary agent which ignites the Napalm gel is contained in the burster charge (R. 8, 10, 12, 13, 77). The burster is a steel tube inserted in the nose of a bomb and extending through its center, which contains a column of explosive TNT and a column of white phosphorous (R. 10).[1] The function of the explosive is to rip open the steel bomb case and scatter its contents. The white phosphorous is the incendiary or self-igniting agent, which ignites in the air when blasted out by the explosive charge and sets the Napalm gel on fire (R. 12, 79). In addition, a complete incendiary bomb contains a fuze. The fuze is a device in the nose of the bomb which, on impact, sets off a primer cup with a small explosion sufficient to fire the burster. The burster and fuze represent more than 75% of the construction cost of a complete bomb, whereas the steel case and Napalm filler comprise less than 25% of the cost (R. 10-11).

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[1] For further details as to the parts of a completed incendiary bomb, see *Union Pacific Railroad Co.* v. *United States*, 125 C. Cls. 390, 401.

It is undisputed that the shipments involved contained neither the burster nor the fuze and that they therefore did not contain either the incendiary element, *i.e.*, the white phosphorous, or the explosive element, *i.e.*, the TNT (R. 5). The only bomb parts shipped, as already noted, were the steel cases filled with gasoline which had been thickened by the addition of aluminum soap powders for the purpose of retarding the gasoline's free-flowing qualities (R. 8-9, 12, 76).

These steel bomb cases filled only with Napalm gel were similar to a "steel container filled with gasoline, with the exception that the Napalm gel filling does not flow as readily as gasoline and if ignited does not burn as rapidly as gasoline" (R. 76). Indeed, a "bomb body filled with Napalm Gel * * * presents considerabl[y] less hazard in transit, from a transportation viewpoint, than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline" (R. 9, 77). In light of these facts, the Bureau of Explosives, which polices the Interstate Commerce Commission's Regulations on "Explosives and Other Dangerous Articles" (49 C.F.R., Parts 71-78, published originally as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tariff No. 8*), has consistently ruled that a Napalm-filled bomb case, shipped, as here, without fuze or burster, is "not a dangerous article" subject to the Regulations and hence is "not required to be shipped in accordance with the * * * regulations" (R. 20, 21).[2]

[2] The Bureau of Explosives is a private "association," organized under the auspices of the Association of American Railroads, and consists primarily of railroads, steamship companies and explosives manufacturers (R. 19). See H. Rep. 3250, 81st Cong., 2d Sess.

The Government, claiming that the tariff rates for the shipments in question should be the fifth-class rates applicable to gasoline in steel drums or containers, paid the carriers on that basis, either originally or by deductions.[3] The carriers, asserting that the proper rates were the high, first-class rates established by Item 1820 of the Freight Classification for a complete incendiary or explosive bomb, filed these suits, in 1954, in the Court of Claims to recover the difference (R. 1, 23, 54).

The Government's answers claimed that Item 1820 is inapplicable, and that no additional sums were due respondents (R. 4, 51, 69). Respondents moved for summary judgment, relying on *Union Pacific Railroad Co.* v. *United States,* 125 C. Cls. 390, and asserting that the facts and issues in that case were identical (R. 6, 52, 70). In opposition, the Government submitted uncontroverted affidavits to show that Item 1820 did not apply, and it contended that, at the least, there was a genuine issue of material fact as to whether the articles in question—steel cases filled with Napalm gel —were "incendiary" (R. 8-22, 72-74, 75-83).

The Government also opposed the motion for summary judgment on the ground that, if the court below was of the view that Item 1820 was in terms applicable, there was then presented a question of the reasonableness of the high, first-class rates as applied to the nonhazardous shipments involved. The Government, on this aspect of the case, requested the court to suspend

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[3] All three carriers billed the Government at the higher rate. Bangor and Seaboard were originally paid for their shipments in 1944 on that basis but, on subsequent audit by the General Accounting Office, the charges were recomputed at the lower rate and the difference was deducted from the amounts due on later transportation services performed by those carriers. The Western Pacific shipments in 1948 and 1950 were originally paid for by the Government on the basis of the lower rate and not as charged by the carrier.

the proceedings and to refer that question to the Interstate Commerce Commission as the only body empowered to pass on the reasonableness of railroad tariff rates.

Finally, with particular reference to the 200 shipments moved by respondents Bangor and Seaboard in 1944, the Government showed, by other uncontroverted affidavits, that in November, 1943, before any of the shipments were tendered for transportation, the Army requested the Official Classification Committee [4] for a ruling as to the rate applicable to non-explosive and non-dangerous bomb parts, consisting of steel cases filled with Napalm gel (R. 81-82). [5] In response, the Committee, on November 23, 1943, ruled that the proposed shipments—without burster or fuze—"were not dangerous," and so should be rated by analogy as "Empty Aerial Bombs," under Item 1895 (R. 80). [6]

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[4] The Official Classification Committee is a "creation of the railroads." *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 534, 541. It, together with the other Classification Committees, writes and publishes the Consolidated Freight Classification and assigns "classification ratings to all prospective transportable articles." *Ibid.*, at p. 542. The Committee performs these functions, pursuant to powers of attorney on file at the Interstate Commerce Commission, as attorney and agent for the various carriers, including respondents Bangor and Seaboard. For a survey of the functions of the Classification Committees, see Wilson, *Transportation and Communication* (1954) pp. 144-147; *Wiprud, Justice in Transportation* (1945) pp. 78-80; and *Western Traffic Assn.—Agreement*, 276 I.C.C. 183, 192.

[5] This request was made pursuant to the established and normal practice "for any shipper who is in doubt as to the appropriate classification rating applicable to his shipment to get in touch with the classification committee for its opinion and ruling as to the appropriate classification rating" (R. 74).

[6] The rate for Item 1895, approximating the fifth-class rate applicable to gasoline in steel drums, was about one-third of that under Item 1820. Consolidated Freight Classification No. 16, issued and effective in 1943, shows that the carload rating for Item

This committee's ruling, expressly confirmed on May 4, 1945 (R. 80), was in effect when the Army made the 200 shipments over the lines of respondents Bangor and Seaboard. Relying on this ruling, issued by the railroads' own Committee, the Government contended that respondents Bangor and Seaboard were estopped from claiming that the higher rates of Item 1820 applied to the 1944 shipments.

The Court of Claims, with two judges dissenting, adhered to its *Union Pacific* ruling, and held that Item 1820 applied (R. 84-86). In addition, while recognizing the "Government's right to have the reasonableness determined" by the Interstate Commerce Commission, the court ruled that the running of the two-year statute of limitations appearing in Section 16(3) of the Interstate Commerce Act destroyed that right (R. 84). Holding, finally, that Bangor and Seaboard were not estopped, the court granted the carriers' motions for summary judgment and entered judgments of $14,280.06 for Western Pacific, $73,056.95 for Bangor, and $28,561.93 for Seaboard (R. 85, 87, 88).

The dissent of Judge Madden, in which Chief Judge Jones joined, objected to the grant of the motions for summary judgment and to the court's refusal to "let the Government prove, if it can, that the objects in question are not incendiary" (R. 86). It states (*ibid.*) that "to name them incendiary bombs for the purpose of these tariffs is to misname them." Declaring further that the majority's opinion results from the "kind of pure literalism ha[ving] no place in the law", Judge

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1895 was 37½% of first class in the Official Classification Area, sixth class in the Southern Classification Area, and fifth class in the Western Classification Area. For all three areas, the rate applicable under Item 1820 was first class.

Madden noted that "the whole reason and justification for charging high rates for the carriage of objects is their incendiary and extra-hazardous character;" that the carriers "do not attempt to justify the high rates [demanded by them here] on the basis of high hazards;" and that, under the court's judgment, "our Government and our taxpayers are made to pay for insurance against non-existing risks, and the railroads are getting something for nothing" (*ibid.*).

SUMMARY OF ARGUMENT

I

A. In this suit for transportation charges filed by the carriers against the United States under the Tucker Act, the Court of Claims has ruled that the Government has no right to a referral of the issue of reasonableness to the Interstate Commerce Commission, if it appears that the two-year limitations period declared by Section 16(3) of the Interstate Commerce Act for suits before the Commission by shippers has expired. Carriers, the court below has regularly ruled, are not subject to the two-year limitation of Section 16(3) (although the language of that Section also covers "[a]ll actions at law by carriers * * *") when suing the United States, and may avail themselves of the six years provided by the Tucker Act. Now, this ruling is carried a step further. The same limitation which has been held to constitute no bar to the carrier's suit is held to bar the United States from obtaining consideration of one of its defenses to that suit. The practical consequence is that a carrier seeking to collect charges which are unreasonable as applied to the shipments in question may do so with impunity by waiting two years before proceeding.

The decision below is wrong whether or not one assumes that the United States would be subject to Section 16(3) in filing an independent, affirmative suit before the Commission. A corollary of the court's conclusion that it may hear the plaintiff's claim is the conclusion that it must permit full determination of the defenses thereto. And if, as here, an issue raised by way of defense is one which requires an ancillary determination by an administrative agency, then, on settled principles repeatedly enunciated by this Court, the court must stay its hand and direct a referral to the agency. The agency here involved, the Interstate Commerce Commission, has fully recognized what the Court of Claims has erroneously failed to take into account:—That an agency may act in aid of a court's jurisdiction without regard to limitations provisions which might bear upon that agency's original jurisdiction. There is nothing in the relevant statutes and history to support, no less compel, the grossly uneven result of the ruling below.

B. We believe, additionally, that the Court of Claims was incorrect in its assumption that Section 16(3) would apply to an independent suit filed by the United States with the Commission. While Section 16(3) does refer explicitly to carriers, it does not refer to the United States. And the sovereign is not subject to limitations unless Congress has clearly manifested a purpose to bind it.

II

Apart from the considerations stated under Point I, the court erred in disposing of this case on the carriers' motions for summary judgment. The Government introduced affidavits to show that the shipments in ques-

tion were not incendiary in fact and that they do not fall within the express terms and conditions of the tariff which the carriers would apply to them. The pleadings and affidavits demonstrate conclusively that there were genuine issues of material fact to be resolved. In the words of the dissenting judges, the Government was denied the right to "prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them" (R. 86).

III

With respect to respondents Bangor and Seaboard, the Government resisted the grant of summary judgment on the additional ground that these carriers were estopped from asserting that they were entitled to the high first-class rates applicable to incendiary bombs. Uncontroverted affidavits show that, before the shipments over the rails of Bangor and Seaboard were made, the Government obtained assurances from the carriers' authorized agent, the Official Classification Committee, that fifth-class rates, rather than first-class rates, would apply. Since the Government is entitled to raise the defense of estoppel against a carrier, *Oregon-Wash. R. R. Co.* v. *United States,* 255 U. S. 339, it should have been permitted to prove that the facts warranted application of that doctrine.

ARGUMENT

Introduction

The judgments of the Court of Claims rest upon the implicit assumption that the two-year period of limitations set forth in Section 16(3) of the Interstate Com-

merce Act (*supra,* p. 3) does not apply to suits to recover moneys filed by carriers against the United States.[7] Prior to 1926, the Court of Claims was of the contrary view.[8] In that year, however, it overruled its earlier decisions and concluded that, despite the inclusive terms of Section 16(3)(a), such suits against the Government are controlled by the six-year period of limitations (see 28 U.S.C. 2501) applicable generally to suits in the Court of Claims. *Southern Pac. Co.* v. *United States,* 62 C. Cls. 391. It has adhered to this position in subsequent cases, and this Court has twice declined to review the issue. *Seaboard Airline Railroad Co.* v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U.S. 848; *Union Pacific R.R. Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U.S. 930.

In the instant cases, the Government did not challenge the Court of Claims' jurisdiction; nor did it raise that issue in its petition to this Court. We nevertheless advert to the matter of jurisdiction for two independent reasons. In the first place, the court is always free to consider, of its own motion, jurisdictional

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[7] In the *Western Pacific* case, the claims accrued in 1948 and 1950 when the United States paid the lower rate rather than the amount for which it was billed. That carrier did not file suit until 1954. The shipments carried by respondents Bangor and Seaboard took place in 1944, and suit was brought approximately ten years later. The record is silent, however, as to the dates when the Government, which originally paid Bangor and Seaboard the higher rate, undertook to recoup by deductions from amounts due for later transportation service.

[8] *Schaff* v. *United States,* 59 C.Cls. 318; *Lancaster* v. *United States,* 60 C.Cls. 80. See *Central R.R. Co. of New Jersey* v. *United States,* 60 C.Cls. 578; certiorari dismissed, 270 U.S. 644; *Wabash Ry. Co.* v. *United States,* 59 C.Cls. 322, affirmed, 270 U.S. 1; *Northern Pac. Ry. Co.* v. *United States,* 59 C.Cls. 122; *Western Pac. R.R. Co.* v. *United States,* 59 C.Cls. 67, reversed on other grounds, 268 U.S. 271.

questions, and we deem it appropriate to note that the question is present, at least in the *Western Pacific* case (see note 7).[9] In the second place, we would particularly emphasize that the Court of Claims, while it has persisted in its view that the carriers are not inhibited by the Interstate Commerce Act in filing their suits against the Government, has now reached the anomalous conclusion that the Government is inhibited by that Act in making its defense to such suits.

Thus, the court below has held that the carriers are still free to bring their suits asserting underpayments by the Government, but that the Government is no longer in a position to defend the claims made against it by asserting that the charges which the carrier would impose are unreasonable and by securing a determination on that point through referral to the Interstate Commerce Commission. The Court of Claims refused to refer that issue, although it fully recognized that the matter of reasonableness was exclusively one for the Commission, because it believed that the Commission was precluded from considering the question of reasonableness by virtue of the two-year limitations period set forth in Section 16(3). This subsumes, of course, that the limitation in question may run against the United States (which we question). But entirely apart from the question whether Section 16(3) runs against the United States in *any* situation—a question which need not be reached—the result in the instant case is

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[9] Should the Court undertake to consider the question of jurisdiction, we respectfully refer it to the statements of the Government's views appearing in the *Seaboard* and the *Union Pacific* petitions (October Term, 1949, Nos. 212 and 580). Pertinent portions of those petitions are reprinted in the Appendix, *infra*, pp. 43-58. We adhere to the views there stated.

wrong. We shall argue that, irrespective of whether the United States could file an independent, affirmative claim for reparations with the Commission more than two years after the event giving rise to the claim, the Court of Claims was free to invoke the help of the Commission in aid of its own jurisdiction, and that it was bound to do so when the United States posed the issue of reasonableness by way of defense to the carriers' suits which the court has entertained.

We shall also argue that, apart from the availability of the defense of unreasonableness, the Court of Claims erred in entering summary judgments against the United States in these cases. There were other genuine issues of fact which were unresolved. These involved (1) the question whether the commodities shipped were in fact commodities of the kind covered by the first-class tariffs as written, and (2) the question whether respondents Bangor and Seaboard had taken steps which estopped them from claiming application of the first-class tariffs.

I

The Two-Year Limitation Period of Section 16 of the Interstate Commerce Act Does Not Bar the Government's Right to Have the "Reasonableness" Question Determined by the Interstate Commerce Commission

Inconsistently with its prior ruling that the two-year limitation period of Section 16(3) of the Interstate Commerce Act does not bar suits by carriers against the United States for additional transportation charges, the Court of Claims has held in these cases that the running of the same two-year period deprives the Government of its right to referral of the issue of the rates' reasonableness to the Interstate Commerce Commis-

sion, concededly the only body authorized to pass thereon. Since the Government is thus prevented from asserting the unreasonableness of the high, first-class rates as a defense, the effect of the holding below is that, at the same time that the Government is deprived of the benefit of the two-year limitation as a shield to ward off the carriers' suits, the carriers are free to invoke the provision as a sword to destroy the Government's right to establish its defense on the merits. Nothing in the Act or its history even remotely suggests a Congressional intent to achieve such a grossly uneven result. In addition, the holding below is out of line with numerous decisions of this Court which form the basis for the view, adopted by the Court of Appeals for the Eighth Circuit in *United States* v. *Kansas City Southern Railway Co.*, 217 F. 2d 763, that referrals to the Interstate Commerce Commission are not affected by the two-year limitations period.

A. *The United States Had a Right to Referral of the "Reasonableness" Issue Whether or Not the Government Is Subject to a Two-year Period of Limitations When Filing an Independent Claim with the Interstate Commerce Commission.*

It cannot be denied that if the Government could establish the unreasonableness of the high, first-class rates demanded by the carriers it would constitute a complete defense on the merits. Nor can it be questioned that the determination of such a question of reasonableness is within the exclusive province of the Interstate Commerce Commission. See, *e.g.*, *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291. The court below has itself fully recognized,

in *Union Pacific Railroad Co.* v. *United States,* 125 C. Cls. 390, involving other shipments of Napalm-filled bomb bodies, that (125 C. Cls. at 394):

> * * * [t]his [reasonableness] question is not within our jurisdiction, however, as *the question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission.* [Emphasis added.]

Similarly, a long line of decisions by this Court and the lower courts firmly establishes the need for a court to stay its hand when, in the course of litigation, there arises an issue appropriate for determination only by the Commission. Thus, in *Thompson* v. *Texas Mexican R. Co.,* 328 U.S. 134, 147, which involved a question appropriate for Commission determination, the Court declared:

> * * * in a long line of cases beginning with *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, *the court should stay its hand until the Commission has passed on the matter.* * * * *That course is singularly appropriate here.* [Emphasis added.]

Again, in a comparable case, *Tank Car Corp.* v. *Terminal Co.,* 308 U.S. 422, 433, the Court stated:

> When it appeared in the course of the litigation that an administrative problem, committed to the [Interstate Commerce] Commission, was involved,

> *the court should have stayed its hand pending the Commission's determination* of the lawfulness and reasonableness of the practice under the terms of the Act. *There should not be a dismissal, but as in Mitchell Coal Co.* v. *Pennsylvania R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding.* [Emphasis added.]

Accord: *Smith* v. *Hoboken R. Co.,* 328 U.S. 123; *Mitchell Coal Co.* v. *Penna. R.R. Co.,* 230 U.S. 247, 267; *S. S. W., Inc.* v. *Air Transport Ass'n of America,* 191 F. 2d 658, 664 (C.A. D.C.); *City of New Orleans* v. *Texas & N. O. R. Co.,* 195 F. 2d 882, 887 (C.A. 5); *United States* v. *Kansas City Southern Railway Co.,* 217 F. 2d 763, 770 (C.A. 8); *Arizona Sand & Rock Co.* v. *Southern Pacific,* 280 I.C.C. 285; *Bell Potato Chip Co.* v. *Aberdeen Truck Line,* 43 M.C.C. 337, 343; see, also, *Nathanson* v. *Labor Board,* 344 U.S. 25, 30; *United States* v. *Morgan,* 313 U.S. 409, 422.

On the basis of these settled principles, the Government, raising a question of reasonableness in the instant proceedings, moved to stay the proceedings pending a referral of the question to the Commission. The court below denied the motion, holding that Section 16(3)'s two-year "statute of limitations has run against the Government's right to have the reasonableness determined" (R. 84).[10]

The unfairness and incorrectness of this holding are

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[10] While the court's opinion does not in express terms refer to Section 16(3)'s two-year limitation period, it is plain from the four cases cited by the court on that question (R. 84-85) that the court had in mind the two-year period of Section 16(3).

manifest. Since Section 16(3), as construed by the court below, is inapplicable to suits by carriers against the United States, so that such a suit by a carrier need not be filed within the two-year period allowed by the Section, and since in such a suit the United States cannot, under the holding below, establish the defense of unreasonableness because of the expiration of that Section's two-year period, it is obvious that any carrier seeking to collect charges which are unreasonable may do so with impunity by merely waiting the two years before filing suit.

Section 16(3), on its face, applies to independent reparation proceedings, not to referral to the Commission as an incident to a judicial proceeding. Hence, nothing in the statute compels the uneven result reached by the court below. It may be suggested that the Government might protect itself, when it believes it has been charged an unreasonable rate, by promptly filing an affirmative claim for reparations with the Commission. It should be noted at the outset, however, that this would place the United States at a disadvantage as compared with other shippers. Carriers have only two years in which to bring actions to recover charges asserted against private shippers, and such shippers, in turn, have an equivalent period in which to assert their claims or defenses. Section 16. Private shippers thus need not bring anticipatory claims for reparations.

There is an even more persuasive reason for holding that the Government need not file anticipatory suits. Congress has expressly authorized the Government to invoke self-help. When audit by the General Accounting Office indicates or reveals that the United States has been overcharged by a carrier, the Government may

deduct the amount of overpayment which it finds "from any amount subsequently found to be due such carrier." 49 U.S.C. 66 (*supra*, p. 4).[11] This is the ordinary procedure which the Government follows—a procedure, incidentally, which results in the settlement of numerous controversies without the necessity of litigation. On respondents' theory, the Government could utilize this technique of recoupment only at its peril. Let us suppose (as here) that the Government believes it has been charged an unreasonable amount. Following an audit of the carrier's charges, it recoups by setoff (as, also, was done here, page 13, note 7, *supra*). On respondents' theory, the carrier may thereupon wait until more than two years have elapsed from the date that the original transportation was performed, sue in the Court of Claims on the ground that it has been underpaid, and then meet the claim that the original charges were unreasonable with the rejoinder that it is too late to determine that issue. It is indeed a remarkable notion that the United States loses a defense available to all other shippers by following a procedure adopted by Congress in order to provide an efficacious means of protecting the federal treasury.

None of the four decisions upon which the Court of Claims relied supports its holding. *Midstate Co.* v. *Penna. R. Co.*, 320 U.S. 356, and *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662, both of which involved carriers and private shippers, stand simply for the proposition that an affirmative claim for the recovery of transportation charges must be made within the period fixed by Congress and that this limitation is jurisdic-

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[11] The same Section directs the Government to make payment upon presentation of the carrier's bills.

tional. Neither case involved a question of referral to the administrative agency.[12]

The other two cases cited by the court below (*United States* v. *Director General*, 80 I.C.C. 143; *United States* v. *Southern Railway Co.*, 286 I.C.C. 203) are Commission decisions holding that the United States may not bring an *independent* proceeding for reparations after more than two years have elapsed. We question the correctness of that conclusion (see *infra*, pp. 25-27). In any event, however, the decisions do not determine the question whether a court, as an incident to a judicial proceeding brought against the United States and found to be timely filed, may refer the question of reasonableness of transportation charges to the Commission.

The basic distinction between the two situations (a distinction, as we point out below, which the Commission has recognized) is stressed in the Eighth Circuit's decision in *United States* v. *Kansas City Southern Railway Co.*, 217 F.2d 763. In that case, the Government had brought an action to recover alleged overcharges in connection with the transportation of export grain. The district court, determining that the carrier had charged the established tariff rate and that the validity of the Government's claim turned on the resolution of administrative questions, dismissed the suit. The Government thereupon filed a motion to set aside the order of dismissal and to hold the case in abeyance until the resolution of those questions could be obtained from the Commission. The motion was denied.

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[12] *Kansas City Southern R. Co.* v. *Wolf*, 261 U.S. 133, also cited by respondents, falls in the same category as the *Midstate* and the *Phillips* cases.

Accepting the district court's view as to the administrative nature of the questions involved, the Eighth Circuit vacated the dismissal and remanded the cause for such further proceedings as the district court might deem appropriate to obtain the necessary Commission determination. Stating that "[a]ny right to resort to the Interstate Commerce Commission as a matter of independent and plenary proceeding clearly would now be wholly barred [by limitations]," the court observed that only by holding the action in abeyance and submitting the administrative questions to the Commission would the public treasury be protected (217 F. 2d at 769). In denying a petition for rehearing, the Eighth Circuit again emphasized the propriety of a referral after the limitations period had run, stating (217 F. 2d at 770) that this circumstance

> * * * had left the situation where the Interstate Commerce Commission now was without any power under the statute to grant reparation relief in an administrative proceeding, and that the only way therefore that it presently was possible to safeguard such public interest as might be involved would be "by a holding of the present action in abeyance and allowing the administrative questions to be submitted to the Interstate Commerce Commission for answer, on the basis of their incidence in the judicial proceeding." [13]

The approach adopted by the Eighth Circuit avoids the gross unfairness of the result reached by the court

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[13] See also *Northern Pacific Ry. Co.* v. *United States*, 213 F.2d 366 (C.A. 8). It is significant that in that case, where the two-year period provided in Section 16(3) had also run, the court of appeals, *sua sponte*, directed a referral.

below and gives concrete meaning to the precept that courts and administrative agencies are designed to serve as "collaborative instrumentalities of justice." *United States* v. *Ruzicka*, 329 U. S. 287, 295; *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 620-622.[14]

While the Court of Claims has followed the Interstate Commerce Commission's view that Section 16(3) applies to affirmative claims for reparations filed by the United States, it has ignored the distinction, which the Commission itself has drawn, between an administrative agency's original jurisdiction and its capacity to make a determination in aid of the courts. In States District Court for the District of Arizona to *Arizona Sand & Rock Co.* v. *Southern Pacific*, 280 I.C.C. 285, the carrier instituted suit in the United collect demurrage charges on shipments of cement. The shipper contended that the tariff provisions relied upon were inapplicable and that the charges were unreasonable. By order of the court, the proceedings were stayed to permit a determination by the Commission. The matter was thereupon referred to the Commission, where the carrier interposed the defense that the limitations period fixed by Section 16 had run as to some of the services in controversy. The Commission agreed that the period had run but rejected the defense, noting that "it is the practice of the Com-

[14] As the instant litigation illustrates, there is particular need for such collaboration in transportation cases. Not infrequently, a shipper will defend a carrier suit on two or more grounds, raising issues which are judicial questions (*e.g.*, the meaning and application of a tariff) and other issues (*e.g.*, the reasonableness of the rate determined to be applicable) which are administrative in character. Or a shipper may sue for damages in the district court (see Interstate Commerce Act, Section 9, 49 U.S.C. 9) raising both judicial and administrative questions.

mission to assist the court in instances of the kind stated in [its] order" and that "[a]ppropriate findings and a declaratory order in proceedings such as this are authorized by section 5(d) of the Administrative Procedure Act" (280 I.C.C. at 286). Accordingly, the Commission passed upon all of the questions posed by the court's order, made the appropriate determinations, and transmitted a certified copy of its report to the district court for the latter's guidance. The same procedure was available here. We submit that it should have been followed.

Respondents contend (Brief in Opposition, p. 9) that the *Arizona Sand & Rock Co.* case is unsound, as demonstrated by this Court's decision in *Montana-Dakota Co.* v. *Pub. Serv. Co.*, 341 U.S. 246. This is not so. The reason for the Court's refusal, in *Montana-Dakota*, to refer an issue of reasonableness (raised there by the plaintiff) to the Federal Power Commission was that the complaint was not deemed to state "a federally cognizable cause of action" (p. 253). And that was held to be so because the Federal Power Act, unlike the Interstate Commerce Act, makes no provision for awarding reparations or damages to victims of unreasonable or unlawful rates, but provides only prospective remedies. It should be noted that the four dissenters in *Montana-Dakota* agreed that the Power Act "does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages to those injured by violations of the Act" (p. 260). It was their view, however, that it was within the general powers of the district court, in the circumstances of the particular case, to impose civil liability even though the Federal Power Act expressed no remedy.

Here, of course, the shipper is given a statutory remedy for unreasonable charges or other damages suffered. See Interstate Commerce Act, Section 9, 49 U.S.C. 9. And the question is whether the carrier which asserts a right to sue the United States for transportation charges free from the limitations restrictions imposed by Section 16 of the Interstate Commerce Act may rely on that very Section to defeat consideration of the defense that the charges which the carrier would impose are unreasonable.

B. *The United States Is Not, in Any Event, Subject to the Limitations Provisions of Section 16(3)*

In the preceding section of this brief, we have assumed that the United States would be subject to a two-year period of limitations in filing an independent claim with the Commission, and we have urged that, even on that assumption, there is no obstacle to the referral which the Government sought. Here, we shall point out that the assumption is unsound.[15] If we are correct on either branch of the argument, it follows, of course, that the Court of Claims erred in its conclusion that a referral should not be directed.

There is no expression in Section 16 indicating that the limitations provisions there set forth shall run against the sovereign. And "[i]t is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the

[15] As indicated *supra*, page 21, the holdings of the Interstate Commerce Commission on this point are contrary to the Government's position.

United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." *United States* v. *Nashville &c. Ry. Co.*, 118 U.S. 120 125. See, also, *United States* v. *Summerlin*, 310 U.S. 414, 416; *Board of Commissioners* v. *United States*, 308 U.S. 343, 351; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126;[16] *Davis* v. *Corona Coal Co.*, 265 U.S. 219, 222-223; *DuPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 461-462; *United States* v. *Whited & Wheless*, 246 U.S. 552, 561-562.

DuPont de Nemour & Co. v. *Davis, supra*, is of particular significance because of its closeness to the situation presented here. That case involved a suit by the Director General of Railroads against a shipper for demurrage charges accruing during the period of federal control of the railroads. The shipper sought to defend on the ground that the claim was barred by the limitations provision of Section 16(2). Rejecting this defense, the Court stated (264 U.S. at 462):

> In taking over and operating the railroad systems of the country the United States did so in its

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[16] In the *Guaranty Trust* case, Justice Stone, speaking for a unanimous Court, stated (pp. 132-133). "Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. * * * So complete has been its acceptance that the implied immunity of the domestic 'sovereign,' state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included; and to the Conformity Act."

> sovereign capacity, as a war measure "under a right in the nature of eminent domain," * * * and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during federal control, as we have seen, are the property of the United States. * * * An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in the governmental capacity, * * * and, therefore, is subject to no time limitations, in the absence of congressional enactment clearly imposing it. * * * Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government. * * *

We find no basis for suggesting that the United States, as a carrier, is unaffected by limitations provisions but that it is subject to such provisions in its capacity as a shipper. In both situations the controlling question is whether there is a clear manifestation of Congressional purpose to bar the Government. There is no such manifestation in Section 16(3), as it now reads, any more than there was when this Court decided *Du Pont de Nemours & Co.* v. *Davis.*

II

The Court Below Erred in Holding that, as a Matter of Law, the High First-Class Tariff Rates Apply to the Shipments Involved

Quite apart from its action in precluding consideration of the Government's claim that application of the first-class rates would result in unreasonable charges, the Court of Claims erred, we believe, in

entering summary judgment over the claim of the Government that it could show that the first-class rates are inapplicable because steel bomb casings filled with Napalm gel are not, as a matter of fact, "incendiary bombs." Summary judgment may be granted only where the movant is entitled to judgment as a matter of law (Court of Claims Rule 51(d); F.R.C.P. Rule 56(c); *Seaboard Surety Co.* v. *Racine Screw Co.*, 203 F. 2d 532, 534 (C.A. 7)); it must be denied where there is a conflict as to some material fact (Court of Claims Rule 51(d); F.R.C.P. Rule 56(c); *Campana Corp.* v. *Harrison*, 135 F. 2d 334 (C.A. 7); *Slagle* v. *United States*, 228 F. 2d 673 (C.A. 5)).[17] Here, the record reveals a sharp conflict as to whether in fact the steel bomb casings filled with Napalm gel constituted "incendiary bombs" within Item 1820.

In opposition to the carriers' motions for summary judgment, the Government filed affidavits demonstrating that there were genuine issues of material fact.

The affidavit of Bernard F. Fay, a chemical engineer with thirty years' experience in "explosives, combus-

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[17] The question to be decided on "a motion for summary judgment" is only "whether or not there is a genuine issue of fact, and not how that issue should be determined." *Gifford* v. *Travelers Protective Ass'n*, 153 F. 2d 209, 211 (C.A. 9); *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101 (C.A. 8); cf. *Fountain* v. *Filson*, 336 U. S. 681; *Vale* v. *Bonnett*, 191 F. 2d 334 (C.A.D.C.); *Chappell* v. *Goltsman*, 186 F. 2d 215, 218 (C.A. 5). And, because the summary-judgment procedure is an extreme remedy and results in a denial of the benefit of a trial on the merits, all "doubts as to the existence of a genuine issue should be resolved" against the movant, who has "the burden of showing the absence of a genuine issue of material fact." *Assets Service Corp.* v. *United States*, 121 C. Cls. 308, 312; *Union Transfer Co.* v. *Riss & Co.*, 218 F. 2d 553, 554 (C.A. 8). See *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620; *Traylor* v. *Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213, 216 (C.A. 8).

tion and metallurgy," shows that he would testify that Napalm gel in a bomb body "is not incendiary" (R. 8). Dr. Leo Finkelstein, a chemical engineer with over forty years' experience whose duties include research in incendiaries and smoke, also states unequivocally that a Napalm-filled bomb body "is not incendiary" (R. 10). Dr. Homer Carhart, Head of the Fuels Branch, Chemistry Division, Naval Research Laboratory, takes the same position. His affidavit points out that "Napalm gel itself is not incendiary, since it is not capable of spontaneous combustion," and that "Napalm gel is not different from rubber cement which is also used as a component of incendiary bombs but which itself is not incendiary" (R. 12). Similarly, Dr. Sidney Magram, Branch Chief of the Incendiary and Aerosol Branch at the Army Chemical Center, expressly concurs in the view that Napalm-filled bomb bodies, without the burster and the fuse, are "not incendiary" (R. 13).

Professor Walter H. Bauer, Head of the Physical Chemistry Division of Rensselaer Polytechnic Institute's Chemistry Department, has been engaged since 1941 in the development of Napalm and similar products (R. 75). In concurring in the view that Napalm gel is not incendiary, his affidavit states (R. 76, 77):

> * * * Napalm gel which is used in filling bombs are mixtures of non-inflammable material consisting of mixed aluminum soaps and combustible liquids such as gasoline. * * *
>
> *Napalm gel in bombs does not have any incendiary qualities* * * *.
>
> In summary, the *napalm content of napalm gel is not incendiary.* [Emphasis added.]

This is also the view of Dr. Robert W. Van Dolah, the Chief of the Division of Explosives Technology in the Bureau of Mines and the Head of the Chemical Division of the Naval Ordnance Test Station from 1946-1954. Dr. Van Dolah's affidavit points out (R. 79):

> VIII. That napalm gel in itself is not an incendiary.
>
> IX. That napalm gel is merely a gelled mixture of hydrocarbons.
>
> X. That napalm gel has no incendiary characteristics and is not capable of self-ignition or spontaneous combustion.
>
> XI. That a container of napalm gel need not be handled differently from a container of gasoline in the interests of safety and is not considered as incendiary.

Respondents, on the other hand, assert that Napalm is an incendiary gel and that the shipments involved in this litigation accordingly consisted of steel cases "filled with incendiary gels." Brief in Opposition, pp. 3, 11. Plainly, these diametrically opposed claims by the respondents and the Government as to the nature and characteristics of Napalm gel present an issue of fact.

This disputed fact, *i.e.*, whether a steel case filled with Napalm gel is an incendiary bomb, is critical to applicability of Item 1820. Item 1820 is entitled "Bombs or mines" and is one of twelve different subdivisions indented and listed under Item 1800's general description of "AMMUNITION, Explosive, Incendiary or Gas, Smoke or Tear Producing, see Note 1, item 1805."[18]

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[18] The provisions of Consolidated Freight Classification Number 17, as set forth in Item 1800 and its subdivisions (Items 1810 to

Obviously, any of the twelve specific items falling under Item 1800 must conform, at the minimum, to that general description.

This general description sets up three requirements, each of which must be met before an article falls within the general category or its specific subdivisions. First, the article must be ammunition. Assuming for the present that the bomb cases here constitute ammunition,[19] Item 1820 goes on to require, as the second con-

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1865), and the carload ratings applicable to each subdivision are as follows:

Item	Articles	Carload Ratings
1800	AMMUNITION, Explosive, Incendiary or Gas, Smoke or Tear Producing, see Note 1, item 1805:	
1805	Note 1.—Subject to Rule 39, except that Section 16, page 58, of Agent H. A. Campbell's Tariff I.C.C. No. 4, in so far as it authorizes shipments to be made in accordance with regulations of the War and Navy Departments shall be applicable only to CL shipments.	
1810	Ammunition, fixed, for cannon, with empty, sand-loaded or solid projectile, loose or in packages....	4
1818	Ammunition, fixed, noibn, for cannon, loose or in packages	1
1820	Bombs or mines, loose or in packages.....	1
1825	Boosters or detonating fuzes, loose or in packages..	1
1830	Cartridge cases (catridge shells), cannon, empty, primed, loose or in packages	3
1835	Cartridges, cannon, blank, loose or in packages....	4
1840	Cartridges, small arms, blank or loaded, noibn, in boxes	4-5
1845	Fuzes, combination percussion, tracer or time, loose or in packages	3
1850	Grenades, hand or rifle, loose or in packages.....	1
1855	Percussion caps, in boxes	3
1860	Primers, cannon or smal larms, in boxes	1
1865	Projectiles, for cannon, loose or in packages	1

[19] Should the cases be remanded to the Court of Claims, we are prepared to show that bomb cases with Napalm gel are not in fact ammunition.

dition of its applicability, that the article be either explosive, incendiary, gas, smoke, or tear-producing. If the bomb cases with Napalm gel are not incendiary, as the Government affidavits show, concededly they do not fall under Item 1820.[20]

Finally, by reference to Note 1, the general category is expressly made "subject to Rule 39." See note 18, pp. 30-31. That Rule, in turn, incorporates the Interstate Commerce Commission Regulations on "Explosives and Other Dangerous Articles" (49 C.F.R., Parts 71-78, originally published as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tariff No. 8*). (R. 18.) The conclusion that an article does not fall under Item 1800 or its subdivisions unless it is "subject to" these Regulations is supported by unchallenged affidavits, presented to the court below in opposition to respondents' motions for summary judgment. Thus, the affidavit of Russell B. Amick, whose official duties over the past thirty-five years have required "constant use and application of tariffs issued by common carriers," declares that "by reason of the reference in that item to Note 1," Item 1800 is limited in application to those items "which are subject to the rules and regulations published in Agent W. S. Topping's Tariff No. 4, I.C.C. No. 4," *i.e.*, the Interstate Commerce Commission Regulations on "Explosives and Other Dangerous Articles," 49 C.F.R., Parts 71-78 (R. 15). Similarly, A. S. Dolch, whose rate transportation experience spans a period of fifty years and includes reissuance of freight tariffs, states in his affidavit that,

> * * * in order for an article to be rated under Item 1800 or any of its specific twelve subdivisions

[20] Respondents have never suggested any other basis for rating the articles first-class. See Brief in Opposition, p. 11 *et seq.*

(Items 1810 through 1865) it must be an article which itself is subject to regulation under Topping's Tariff I.C.C. No. 4 These regulations are promulgated by the Interstate Commerce Commission and are published in the Code of Federal Regulations at 49 C.F.R., Parts 71-78. [R. 18-19.][21]

Uncontroverted affidavits show that Napalm-filled bomb bodies, unlike such items as primers, grenades, boosters, fixed ammunition (see note 18), are *not* subject to the Regulation. T. C. George is Assistant Chief Inspector of the Bureau of Explosives,[22] which enforces the Regulations. His affidavit points out that a Napalm-filled bomb body, shipped, as in the instant case, without fuze or burster, is "not a dangerous article or an explosive article" subject to the Regulations and hence is "not required to be shipped in accordance with the Interstate Commerce Commission Regulations governing the shipment of explosives and other dangerous articles" (R. 20-21).

That Napalm gel is not subject to the Regulations on "Explosives and Other Dangerous Articles" is significant for an additional reason. Obviously, it is the relatively non-hazardous nature of Napalm gel which frees

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[21] This reading of Item 1800 is supported still further by the fact that each of the twelve specific items listed in Items 1810 through 1865—*e.g.*, primers, grenades, boosters, fixed ammunition—*is actually* subject to the Regulations. (Compare those twelve items with their respective counterparts listed in Section 72.5 of the Regulations on "Explosives and Other Dangerous Articles.") (49 C.F.R. 72.5.) Even without resort to the rule calling for strict construction of the tariff against the carriers who prepared it, this makes doubly clear the need for requiring coverage under the Regulations as a condition precedent to invoking the Item 1800 series classification.

[22] The Bureau is a private, non-governmental organization. Its "finances are administered by the Association of American Railroads" (R. 19); see page 6, note 2.

it from the strict packing, marking, loading, and handling requirements imposed by the Regulations.[23] It is equally clear that the high first-class rates applicable to explosives and other dangerous articles under Item 1820 find their justification in the fact that the transportation of such articles is "attended with great risk," that "heavy expenses are incurred [by the carriers] in conforming to [the I.C.C.] regulations," and that the "first class" rate is therefore the proper rate "to apply on this traffic." *Rates on Powder and High Explosives,* 151 I.C.C. 155, 163; *Austin Powder Co.* v. *Wheeling & L.E. Ry. Co.,* 156 I.C.C. 334, 337; *Du Pont de Nemours & Co.* v. *B. & O. R.R. Co.,* 128 I.C.C. 705, 706. Here, application of the first-class rates forces the Government to reimburse the carriers for risks and expenses they do not incur. As Judge Madden's dissent observes, "our Government and our taxpayers are made to pay for insurance against non-existent risks, and the

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[23] It is, of course, the degree of hazard involved which accounts for the variation of ratings assigned to the twelve subdivisions under Item 1800. Thus, the very high first-class rating of Item 1820—which respondents seek to apply here—is shared only by such extremely dangerous articles as fixed ammunition for cannon (Item 1815), boosters or detonating fuzes (Item 1825), grenades (Item 1850), and cannon projectiles (Item 1865). See page 31, note 18. Less explosive and less dangerous commodities, such as percussion caps (Item 1855), are assigned a third-class rating, while the least explosive and hazardous ammunition, such as small arms cartridges (Item 1840), are rated fourth or fifth class. *Id.* It is clear from these variations in assigned ratings that they correspond to the relative degree of explosiveness or danger involved. It is also clear that the crucial identifying character of the type of "bomb" contemplated by Item 1820 is its explosive and hazardous nature, a characteristic which the steel bomb cases here did not possess.

Note, also, the Court of Claims' opinion holding that Napalm must be classified as "soap powder" for freight-rate purposes. *Union Pacific Railroad Co.* v. *United States,* 117 C. Cls. 757.

railroads are getting something for nothing" (R. 86). While this consideration goes to the issue of reasonableness, it is also relevant to the question of tariff interpretation, for, like any other instrument, a tariff is to be read in the light of its known purposes and in a manner which avoids unnecessary and gross unfairness.[24]

In summary, it seems clear that the Government is entitled to adduce evidence to show that the commodity in question does not fall within the terms of the tariff which the carriers would apply, and to show further that related interpretations and practices, as well as simple considerations of fairness, support this view. We do not argue that this Court need resolve the question of tariff interpretation. We do contend that the Government's answer and the numerous affidavits which it filed in opposition to the carriers' motions for summary judgment show that there were genuine issues of fact to be resolved. And we urge that the Court exercise its supervisory powers to assure the Government its day in court on those issues. It has the right, in Judge Madden's words, to "prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them" (R. 86).

III

The Court of Claims Erroneously Denied the Government Its Right to Determination of the Issue of Estoppel

As to respondents Bangor and Seaboard, the Government further contended, in opposition to the granting

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[24] Compare the Court of Claims' statements in *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 757, 764; 125 C. Cls. 390, 393-394.

of summary judgment, that they were estopped from claiming that the high first-class tariff rates of Item 1820 applied to the 200 shipments carried over their lines in 1944. The Court of Claims ruled, however, that there was no estoppel, stating that "we do not see how the [Government] could reasonably have been misled or injured by the ruling, especially when the [carriers] promptly billed the [Government] at the first-class rate and the [Government] paid that rate and continued to make the shipments at that rate" (R. 85). But here, as on the classification issue (Point II), disposition turned upon questions of material fact, which, under settled principles, required the denial of summary judgment.

In the court below, the Government undertook to show that in November 1943, before tender of the 200 shipments, the Official Classification Committee, at the Army's request, issued a ruling as to the appropriate transportation rate;[25] that the ruling rejected the high first-class rate of Item 1820 and, on the ground that the shipments were not dangerous, declared rates approximating fifth class to be applicable; that, following this ruling, the Army made the 200 shipments in question; and that the ruling was in effect during the entire period that these shipments took place and was expressly confirmed on May 4, 1945. See R. 80.

Assuming these facts, we believe that respondents are estopped from asserting that they are entitled to transportation charges in excess of those quoted by their agent, the Classification Committee. All of the

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[25] The Classification Committee is a "creation of the railroads" and acts as attorney and agent for the various carriers, including respondents Bangor and Seaboard. See page 8, note 4.

elements of a classic estoppel appear to be present: (1) a ruling and representation by the Committee, acting on behalf of the carriers; (2) expectation by the Committee that the shipper would rely thereon; (3) numerous shipments by the Army over respondents' lines during 1944, while the ruling was in full effect; and (4) detriment to the Army, because it could have used other shipping procedures or other means of transportation had it not been led to believe that the rail shipments would move at the lower rate available under Item 1895, rather than the high first-class rate of Item 1820.[26] See 3 Pomeroy, *Equity Jurisprudence* (5th ed. 1941), Sec. 805, and cases cited.

It is true, as pointed out by the Court of Claims (R. 85), that a private shipper in interstate commerce cannot invoke the defense of estoppel to prevent a carrier which has quoted a lower rate from collecting a higher rate prescribed in the applicable tariff.[27] This follows

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[26] The statement below that the Government could not "reasonably have been misled or injured by the ruling" is without support in the record and purely speculation. Had the Army been advised, before the 1944 shipments, that the railroads expected to charge the Item 1820 rate, the Army could have given consideration to breaking the shipments into their component parts by shipping the steel cases and Napalm gel separately, thus obtaining the benefit of the low fifth-class rates concededly applicable to each of the component parts. A similar shipping procedure is now utilized by the Army. The record shows that the Chemical Corps has regularly shipped "napalm thickener * * * separate and apart from the bomb body" of fire bombs (gasoline-tank type) (R. 72).

Moreover, had the Army been so advised before 1944, it could also have considered moving the Napalm-filled bomb bodies by motor carrier, rather than rail, so as to obtain a lower transportation rate.

[27] We assume, *arguendo*, at this point, that the high first-class rates of Item 1820 may correctly and reasonably be applied to the shipments.

from the fact that Section 6 (7) of the Interstate Commerce Act (49 U.S.C. 6(7)) forbids departures from the rates established by the carriers' published tariffs.[28] Were the rule otherwise, estoppel could "become the means of successfully avoiding the requirement of the Act as to equal rates * * *." *Pittsburgh, &c. Ry. Co.* v. *Fink*, 250 U.S. 577, 583; *N. Y. Cent. R.R.* v. *York & Witney Co.*, 256 U.S. 406; *L. & N. R.R.* v. *Central Iron Co.*, 265 U.S. 59, 65; *Illinois Steel Co.* v. *B. & O. R. Co.*, 320 U.S. 508, 513.

But this rule, resting as it does upon the statutory policy of preventing one private shipper from gaining competitive advantage over another, has no application to the situation where a differentiation between shippers is permitted by statute. Section 22 of the Act states (49 U.S.C. 22):

> Nothing in this [chapter] shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States * * *.

It declares a specific policy which supersedes, *pro tanto*, the general policy of Section 6(7) against discrimination in rates. There is accordingly no basis for extending to Government shipments the general policy against rate concessions. By the same token, there is no justification for permitting the carrier to avoid the effect of its concessions.

The holdings of this Court are conclusive, we believe,

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[28] Section 6(7) provides, in pertinent part: "Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified * * *."

on the proposition that the Government may invoke the defense of estoppel against a carrier. In *Oregon-Wash. R.R. Co.* v. *United States,* 255 U.S. 339, the railroad transported the baggage and personal effects of Army officers transferred to new stations. The railroad was paid by the Government at reduced "land-grant" rates, in the belief that the baggage transported was covered by "land-grant equalization agreements" between the railroad and the Government, providing for such reduced rates for Government property. It then became settled by a court decision that the baggage, not being owned by the Government, was not covered by the agreements and was covered by the higher commercial tariff rate. The railroad sued to recover the difference between the higher rate and the rate actually charged. This Court denied recovery, holding that the railroad was estopped from claiming the higher rate.

This decision was handed down together with *Western Pac. R.R. Co.* v. *United States,* 255 U.S. 349, where the Court made explicit its view that Section 22, allowing preferred rates for the Government, destroys the basic premise on which a private shipper is denied the right to invoke the defense of estoppel. The facts in that case paralleled those in *Oregon-Wash.* In holding that the railroad had waived its right to claim the rate fixed by the tariff, this Court said (255 U.S. at 355-356):

> A contention, however, is made that was not made in [the *Oregon-Washington* case], that is, that "under the Interstate Commerce Law the final carrier [respondents were final carriers of the transportation with which this case is concerned] is not only empowered to collect the through charge,

but is burdened with the duty and obligation of collecting the full published tariff rate and is powerless to relieve or release a shipper or consignee from any part of the same."

The further contention is that within this obligation is the property in the pending case. The immediate answer is that § 22 of the Interstate Commerce Act permits reduced rates to the United States, and that by Conference Ruling of the Interstate Commerce Commission No. 33 of February 3, 1908, § 22 is made applicable to property transported for the United States. The transportation in the present case was for the Government, and in providing for it and paying for it the Government performed a governmental service.

Moreover, the Government's right to invoke estoppel was not forfeited, as the court below ruled (R. 85), because the Government paid the carriers' bills as rendered. Congress has directed the Government to pay transportation bills on presentation (49 U.S.C. 66, *supra,* page 4). At the same time, as a necessary protective measure, the statute reserves to the Government the right to deduct any overpayment from amounts subsequently found to be due the carrier. Thus, the section "provides for *prompt payment* to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States and includes a provision for deduction of overpayments." H. Rep. No. 1217 on S. 2009, 76th Cong., 1st Sess., p. 28 (emphasis added).[29] This right to deduct

[29] The Section represents the full recognition of the legitimate interests of both the carriers and the public treasury. On the one hand, the carrier receives almost immediately those sums, the pay-

for overpayment was exercised by the Government in the *Bangor* and the *Seaboard* cases. See page 7, note 3.

The Court of Claims' view that prompt payment deprives the Government of its right to invoke estoppel against the carrier can hardly be squared with the Congressional mandate that the carrier's bills be paid promptly on presentation. In view of the statutory requirement, the Government, even if overcharged, has no choice but to make prompt payment. In these circumstances, prompt payment without interposing any objection can be taken to mean no more than that the Government is complying with the statutory directive and that, at the same time, it is reserving its rights to claim, on a later audit, that it has been overcharged. To the extent that it makes the prompt payment result in a forfeiture of the Government's right to claim an overcharge, the opinion below incorrectly strips the Government of the post-audit protection expressly reserved to it.[30]

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ment of which formerly had to await completion of a prepayment audit. On the other hand, should the carrier in the process obtain a payment later determined by the General Accounting Office to be invalid or incorrect in amount, it must promptly refund or the Government will deduct the overpayment from amounts due the carrier on later transportation services.

[30] The opinion below also refers to a supposed concession by the Government in an earlier Napalm gel case. *Union Pacific Railroad Co.* v. *United States*, 125 C. Cls. 390. There, the court's opinion states, the Government admitted that the Official Classification Committee had erred in ruling "a lower rate than Item 1820" applied (R. 85).

The Government did concede in the *Union Pacific* case that the articles could not be rated as *empty* bombs, because they were in fact Napalm-filled. And we also recognize that there was testimony in that case to the effect that the Official Classification Committee had attempted to repudiate its earlier ruling that the low fifth-class rates were applicable. But it does not follow, we submit, that the Government admitted that the Committee erred in

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed and the cause remanded with directions which will permit a full presentation of the petitioner's defenses.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.
MELVIN RICHTER,
MORTON HOLLANDER,
Attorneys.

AUGUST, 1956.

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ruling that the fifth-class rates applied. To the contrary, since a steel bomb body is rated fifth class and since Napalm itself, as the Court of Claims has ruled, is ratable fifth class, the Government's consistent position in all of these cases has been that the entire or combined shipment, consisting of the bomb body filled with Napalm, should also be rated fifth class and not first class under Item 1820. See *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 757.

APPENDIX

1. Excerpts from the Government's petition for a writ of certiorari in *United States* v. *Seaboard Airline Railroad Company,* October Term, 1949, No. 212, pp. 5-16.

* * * * *

REASONS FOR GRANTING THE WRIT

As construed by the Court of Claims, 28 U.S.C. 2501, which limits that court's jurisdiction to claims sued upon within six years of accrual, deprives the Government of the benefit of Section 16(3)(a) of the Interstate Commerce Act, which specifically bars actions to recover charges by carriers subject to the Act unless brought within two years. We submit that this result not only flouts the unequivocal language of Section 16(3) (a), but is also wholly inconsistent with the decisions of this Court in *Midstate Co.* v. *Penna. R. Co.,* 320 U.S. 356 (interpreting Section 16(3)(a)) and in *United States* v. *A. S. Kreider Co.,* 313 U.S. 443 (interpreting 28 U.S.C. 2401(a), the counterpart for district court suits of 28 U.S.C. 2501).

1. The inclusive and unambiguous language of Section 16(3)(a), applying, without exception, to "All actions at law by carriers * * * for recovery of their charges," provides no warrant for excepting suits against the Government. Nor does the Court of Claims seek to justify its exclusion of the United States from the protection of this statute on the ground that the statutory terms direct such an exclusion. Indeed, in a series of decisions prior to 1926, that court expressly recognized that "the statute does apply to suits by carriers against the Government" (*Schaff* v. *United States,* 59 C. Cls. 318, 321-322), and held that it barred these suits when not brought within the prescribed period. *Lancaster* v. *United States,* 60 C. Cls. 80. See *Central R.R. Co. of New Jersey* v. *United States,* 60 C. Cls. 578, certiorari dismissed, 270 U.S. 644; *Wabash*

Ry. Co. v. *United States*, 59 C. Cls. 322, affirmed, 270 U.S. 1; *Northern Pac. Ry. Co.* v. *United States*, 59 C. Cls. 122; *Western Pac. R.R. Co.* v. *United States*, 59 C. Cls. 67, reversed on other grounds, 268 U.S. 271.

Then, in *Southern Pac. Co.* v. *United States*, 62 C. Cls. 391 (1926), where the question was scarcely touched upon in the briefs,[2] the Court of Claims overruled this line of cases, holding that, despite the inclusive terms of Section 16(3)(a), suits by carriers against the Government were to be ruled by the six-year jurisdictional statute of limitations (now 28 U.S.C. 2501) applicable to all suits in the Court of Claims. In creating this exception, the court neglected to emphasize, as it had formerly, the clear and all-embracing language Congress had chosen. Instead of recognizing at the outset that "no single argument has more weight in statutory interpretation" than the fact that the statutory language covers the case at hand (*Browder* v. *United States*, 312 U.S. 335, 338), the court adopted as a major premise the principle that repeals by implication are disfavored, and reasoned therefrom that the absence in Section 16(3)(a) of language *expressly applicable to suits in the Court of Claims* was a significant argument for its inapplicability. It is submitted that the court's major premise was irrelevant to the problem before it, and that it erred in its conclusion because of its erroneous choice of a starting-point for its inquiry.[3]

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[2] Apart from the fact that the Court of Claims had already decided this point favorably to the Government, there were then pending in this Court two cases in which it was hoped this question would be finally resolved. But this Court held that Section 16(3) did not apply retroactively and found it unnecessary to decide the question here presented. *United States* v. *St. Louis, S. F. & T. Ry. Co.*, 270 U. S. 1 (Jan. 18, 1926).

[3] Since the court below rests the instant decision upon the reasoning in *Southern Pac. Co.* v. *United States*, *supra*, the discussion here focuses on the arguments adduced in that opinion.

Judicial reluctance to find statutory repeals by implication is limited by the well-defined principle that a statute applicable to a specific class of cases will, within that class, supersede a more general statute. *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107; *Shelton* v. *United States*, 165 F. 2d 241 (C.A.D.C.). This principle precisely relevant here, has operated to bar suits against the Government brought within the six-year jurisdictional limitation period but not within the lesser period prescribed for the cause of action under a specific statute. *United States* v. *A. S. Kreder Co.*, 313 U. S. 443 (five years, under Revenue Act of 1926, § 113(a), 44 Stat. 9, 116); *Christie-Street Commission Co.* v. *United States*, 136 Fed. 326 (C.A. 8) (two years, under R.S. 3227, 26 U.S.C. 3772); *Kahn* v. *United States*, 55 C. Cls. 271, affirmed, 257 U. S. 244 (same); *Fort Pitt Gas Co.* v. *Unted States*, 49 C. Cls. 224 (same); cf. *Mejia* v. *United States*, 152 F. 2d 686 (C.A. 5), certiorari denied, 328 U. S. 862 (one year, Louisiana wrongful death statute). In *United States* v. *A. S. Kreider Co., supra*, referring to the provision in § 24(20) of the Judicial Code (now 28 U.S.C. 2401(a)), fixing for Tucker Act suits in the district courts the same general six-year limitation applicable in the Court of Claims, this Court said (313 U. S. at 447):

> We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24(20). Clearly, nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24(20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment.

Earlier, employing an identical analysis, the Court of Claims had reached similar results. *Kahn* v. *United States, supra,* at 286; *Fort Pitt Gas Co.* v. *United States, supra,* at 234.

The Court of Claims has sought to distinguish its decision in the *Fort Pitt Gas Co.* case by pointing out that the two-year statute of limitations there involved contained the words "in any court," that it therefore indicated "a clear intention to prescribe a definite limitation in all courts." *Southern Pac. Co.* v. *United States,* 62 C. Cls. 391, 398. We submit that this purported distinction is wholly without merit. The reach of Section 16(3)(a) extends to "all actions at law". It is difficult to conceive how these terms, in their present context, can be regarded as less inclusive than "actions * * * in any court." The suggestion that Section 16(3)(a) does not cover actions in the Court of Claims because it does not refer to "any court" could presumably be invoked by every state court whose statute of limitations it supersedes. To state this possibility is to reject it, and to reject along with it the corresponding argument of the court below.

Beginning with the erroneous assumption that to bar suits against the Government under Section 16(3)(a), the plain language of which directed such a result, would effect an impermissible "repeal by implication" of the statute restricting jurisdiction of the Court of Claims to actions brought within six years, the court below was led to attribute to other portions of the Interstate Commerce Act a significance opposite from that which would seem appropriate. The court observed that the Act provides for two exceptions with respect to Government transportation: 49 U.S.C. 22, permitting carriers to provide such transportation free or at reduced rates; and 49 U.S.C. 3(2), permitting extension of credit to the Government without authorization by

the I.C.C.[4] From these exceptions, which Congress knew how to make expressly when it desired special treatment for Government transportation, the court below drew the inference that the Government was intended to be excepted from the operation of Section 16(3)(a), where Congress made no exception of any kind.

The error in this reasoning is, we submit, readily apparent. The express exceptions for government transportation in unrelated portions of the Interstate Commerce Act, are, at the very least, irrelevant to the question whether Section 16(3)(a) applies to suits against the United States. If anything, these explicit exceptions would support the contrary conclusion that none were to be implied elsewhere in the Act.[5]

2. It is submitted that the Court of Claims, in *Southern Pac. Co.* v. *United States,* 62 C. Cls. 391, 399, 403, committed the fallacy referred to by this Court in *Mid-*

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[4] Whatever weight might conceivably have been attributed prior to 1940 to the provision permitting extension of credit to the Government would have disappeared with the congressional directive that payment for government transportation "shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office." Transportataion Act of 1940, Title III, Part II, § 322, 54 Stat. 955, 49 U.S.C. 66.

[5] This latter conclusion has been adopted by the Interstate Commerce Commission, the repeated recommendations of which were followed by Congress in enacting, in the Transportation Act of 1920, the limitation provisions in Section 16(3). See the following Annual Reports of the I.C.C.: No. 27 (1913) pp. 80-81; No. 28 (1914) p. 65; No. 29 (1915) p. 68; No. 31 (1917) p. 68. In *United States* v. *Director General,* 80 I.C.C. 143, 150-151, that agency, whose interpretations of Interstate Commerce Act provisions recommended by it to Congress are entitled to even more than their "great weight" (*United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549), held that there was nothing in the Act's exceptions with respect to the Government which would warrant implying one where none had been expressed. Indeed, it stressed specific exceptions elsewhere in the Act as a basis for its decision that the language of Section 16 even included the Government as plaintiff.

state Co. v. *Penna. R. Co.*, 320 U. S. 356, at 365-366, of "assuming * * * that * * * section [16(3)] reflects only the Act's general policy against discrimination in respect to rates, rebates, etc." while overlooking that "this is true only so far as that policy is consistent with the particular policy laid down by the section, namely, that of strictly limiting the time within which claims may be asserted * * *." This "particular policy" would seem to be at least as relevant to suits against the Government as to suits against any other shipper.

Ignoring the special purpose of Section 16(3), the court below has ignored as well the unbroken series of decisions in which this Court has enforced that purpose by holding that the section's limitations put terms to the substantive rights they govern. Lapse of the specified time does not merely bar the remedy sought; it destroys the asserted right. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667-668; *Louisville Cement Co.* v. *Int. Com. Comm.*, 246 U. S. 638, 642; *Kansas City So. Ry.* v. *Wolf*, 261 U. S. 133, 138-140; *William Danzer Co.* v. *Gulf R.R.*, 268 U. S. 633, 636; *Midstate Co.* v. *Penna R. Co., supra.*

When *Southern Pac. Co.* v. *United States, supra,* was decided, this Court had not yet applied this uniform substantive characterization specifically to subdivision (a) of Section 16(3), limiting suits by carriers against shippers. But this specific extension, following inevitably from the consistent construction of Section 16(3), came in *Midstate Co.* v. *Penna. R. Co., supra.* In adhering to its *Southern Pacific* decision, the court below endows the merely "negative" restriction (see p. [—], *supra*) of 28 U.S.C. 2501 with the power of reviving a cause of action which no longer exists. 28 U.S.C. 2501 does not begin to operate unless there is involved a "claim of which the Court of Claims has jurisdiction

* * *." As applied below, this statute has had the startling effect of creating a right where there was no "claim" to which Court of Claims jurisdiction could attach. Cf. *Finn* v. *United States*, 123 U. S. 227, 232; *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667.

3. In adhering to its decision in *Southern Pac. Co.* v. *United States, supra*, the court below suggests that the subsequent failure of Congress to change Section 16 (3)(a) constitutes implied approval of the holding in that case (R. 27-28). As this Court has frequently declared, however, particularly where statutory language is clear and unambiguous, there is no reason to "expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." *Jones* v. *Liberty Glass Co.*, 332 U. S. 524, 534; cf. *Helvering* v. *Hallock*, 309 U. S. 106, 119-120.

Of greater significance than congressional silence is the recent Act of June 29, 1949, Pub. L. No. 138, 81st Cong., 1st sess., which adds to Parts II, III and IV of the Interstate Commerce Act (covering, respectively, motor carriers, water carriers and freight forwarders) provisions establishing the same limitations as those in Part I, Section 16(3). This statute is designed to establish uniformity among the four parts of the Act. S. Rep. No. 83, 81st Cong., 1st sess., p. 1; H. Rep. No. 766, 81st Cong., 1st sess., pp. 1-2. The language used in fixing periods of limitation is, except for insignificant changes of phraseology, the same as that of Section 16(3). Speaking of these sections in an identical predecessor bill (H. R. 2759, 80th Cong., 1st sess.), Congressman Wolverton, Chairman of the House Committee on Interstate and Foreign Commerce and sponsor of the bill, declared unequivocally that their terms would apply to the Government.[6] Later, the House

[6] "Mr. WOLVERTON. * * * I think it clear that the limitations for which the bill provides would apply to the United States as a

Committee, in reporting the bill which was enacted (S. 257, 81st Cong., 1st sess.), reserved judgment as to whether these provisions "apply to proceedings *instituted by the United States* but * * * left that question for determination judicially as appropriate cases may arise." H. Rep. No. 766, *supra,* at p. 2 (italics supplied).

Even if Chairman Wolverton's remarks are to be read, in the light of the Committee report, as applying to the more difficult cases in which the United States is plaintiff, it is absurd to attribute to Congress the view that the short statute bars the United States as plaintiff but does not protect it as defendant. *Stanley* v. *Schwalby,* 147 U. S. 508, 515-517. Cf. *United States* v. *Interstate Commerce Commission,* No. 330, October Term, 1948. Congressional sentiment ranges, rather, from a rejection of the *Southern Pacific* decision and the decision below to a belief that the applicability of the Interstate Commerce Act limitations provisions to cases in which the United States is a party remains an open question. This state of the Congressional mind underlies the need for clarification by this Court.

4. The importance of the question herein, enhanced by recent Congressional action (Point 3, *supra*), can be measured by the Government's enormous expeditures for transportation and by the inevitable mass of litigation to which they give rise. An authoritative ruling by this Court is needed to determine whether the Government, prepared to pay cash for its transportation (49 U.S.C. 66), is to be subjected to suits up to four years later than similar suits must be brought against private shippers, with all the attendant disruption of

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shipper, just as to any other shippers. * * * I think, too, that there is every reason why these limitations should apply to the United States the same as to any other shipper." 94 Cong. Rec. 131.

The I.C.C., adhering to its position in *United States* v. *Director General, supra,* shares this view. *Ibid.*

Governmental fiscal management which this discrimination implies. Such a ruling will serve to dispose of a great number of cases now pending, not only in the Court of Claims,[7] but in the district courts as well,[8] in which the Government has interposed or will interpose the defense of Section 16(3)(a).

Moreover, apart from the Government's interest as shipper, it is important to determine whether the "paramount policy of § 16 * * * to secure promptness in collection * * *" (*Midstate Co.* v. *Penna. R. Co.*, 320 U. S. 356, 367) is to be emasculated by being made inoperative as to the largest single client of the nation's carriers.

* * * * *

JULY, 1949.

2. Excerpt from the Government's petition for a writ of certiorari in *United States* v. *Union Pacific Railroad Company*, October Term, 1949, No. 580, pp. 4-12.

* * * * *

REASONS FOR GRANTING THE WRIT

The Court of Claims has adhered to its prior decision in *Seaboard Air Line Railroad Co.* v. *United States*, 113 C. Cls. 437, following the refusal of this Court to review that decision (338 U.S. 848).[9] A survey, made

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[7] E.g., *Union Pac. R. Co.*, No. 46989; *Chicago & Eastern Ill. R. Co.*, No. 47575; *Pennsylvania R. Co.*, No. 48473; *Atlantic Coast Line R. Co.*, No. 48825.

[8] E.g., *Chicago & Northwestern Ry Co.* v. *United States*, E.D. Wis., Civil No. 4513; *Northern Pac. Ry Co.* v. *United States* (3 cases), D. Minn., Civil Nos. 1099, 1105, 1106; *New York, Chicago & S. L. R.R. Co.* v. *United States*, N.D. Ohio, Civil No. 26337; *Pacific Electric Ry. Co.* v. *United States*, S.D. Cal., Civil No. 7821-BH.

[9] In addition to the instant case, see *Atlantic Coast Line R. R. Co.* v. *United States*, C. Cls. No. 48826, decided December 5, 1949.

shortly after the decision in the instant case to determine the present importance of the question involved, discloses 123 actions, pending in the Court of Claims and filed more than two years after completion of their services, in which carriers are seeking to recover $11,423,799.98 in charges from the Government.[4] In these suits, the number of which reflects the extent of the Government's role as the nation's largest shipper, it is now futile to continue to interpose the defense which seems to be afforded by Section 16(3)(a) of the Interstate Commerce Act. Accordingly no course is open to the Government in the Court of Claims, other than to abandon that defense, which in many of the cases is the only one available, unless review of the instant decision can be had. Because we believe the court below errs in its refusal to apply Section 16(3)(a) to suits against the Government; because of the magnitude, both in number and amount, of the claims involved; because of the recurrent character of the problem; and because of the peculiar factor in relation to the *Seaboard* petition discussed in the following paragraph, we again seek review.

In the *Seaboard* case (No. 212, this Term), the brief opposing our petition for certiorari was rested almost exclusively upon the argument that the claim involved was for railway mail pay, was not governed by the provisions of the Interstate Commerce Act and was therefore of no general importance. While the court below, in dealing with the present problem, does not suggest any distinction between suits for mail pay and suits for other transportation charges (see instant opinion, R. 8), it is possible that the argument urged by the respondent in the *Seaboard* case has merit, or at least may have had an important part in the denial of our

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[4] The same question is involved in approximately 135 cases now pending in the district courts involving about $465,000.

petition therein. The question of importance as to the general applicability of Section 16(3)(a) to suits against the Government, which we thought was presented by the *Seaboard* case, cannot be avoided in the case at bar.[5] Unless the Court of Claims is justified in reading the statutory limitation on "all actions at law by carriers" as if it said "all actions at law by carriers except actions against the Government," respondent has no right to recover.

1. The inclusive and unambiguous language of Section 16(3)(a), with no remote suggestion of any exception, in a comprehensive and frequently reconsidered statute in which exceptions are made explicit where they are intended, would appear to preclude the result reached by the court below. There is nothing in the legislative history or purpose of the section to warrant judicial addition to the words Congress choose. See *Browder* v. *United States,* 312 U. S. 335, 338. Indeed, the "paramount policy of § 16 * * * to secure promptness in collection * * *" (*Midstate Co.* v. *Penna. R. Co.,* 320 U. S. 356, 367) requires, in serving the important regulatory purpose of keeping carriers' financial affairs relatively current, that there be no exception with respect to the carriers' largest single client.

Finding no exception in the plain language of Section 16(3)(a), the court below justifies its exclusion of suits against the Government essentially on the grounds that (1) to apply it to such suits would effect a repeal by implication of 28 U. S. C. 2501, which permits claims over which the Court of Claims has jurisdiction to be sued upon within six years of their accrual (see *Southern*

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[5] We assume that the denial of certiorari is not to be interpreted as expressing any view on the merits of the controversy. See, *e.g.*, the opinion of Mr. Justice Frankfurter respecting the denial of the petition for writ of certiorari in *State of Maryland* v. *The Baltimore Radio Show, Inc.,* 338 U. S. 912, 917-919.

Pacific Co. v. *United States,* 62 C. Cls. 391, 398), and (2) the Government is different in relevant respects, from other shippers (*id.* at 399-402).[6] Neither of these arguments, we submit, will bear analysis.

Hesitancy to construe statutes as effecting repeals by implication is limited by the well-defined principle that a statute applicable to a specific class of cases will, within that class, supersede a more general statute. *MacEvoy Co.* v. *United States,* 322 U. S. 102, 107; *Shelton* v. *United States,* 165 F. 2d 241 (C.A.D.C.). This principle, precisely relevant here, has operated to bar suits against the Government brought within the six-year jurisdictional limitation period but not within the lesser period prescribed for the cause of action under a specific statute. *United States* v. *A. S. Kreider Co.,* 313 U. S. 443 (five years, under Revenue Act of 1926, § 1113(a), 44 Stat. 9, 116); *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326 (C. A. 8) (two years, under R. S. 3227, 26 U. S. C. 3772); *Kahn* v. *United States,* 55 C. Cls. 271, affirmed, 257 U. S. 244 (same); *Fort Pitt Gas Co.* v. *United States,* 49 C. Cls. 224 (same); cf. *Mejia* v. *United States,* 152 F. 2d 686 (C. A. 5) certiorari denied, 328 U. S. 862 (one year,

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[6] *Southern Pacific Co.* v. *United States, supra,* was the first decision in which the Court of Claims held inapplicable in suits against the Government the limitations now appearing in Section 16(3)(a), after announcing a contrary view in earlier decisions. See *Schaff* v. *United States,* 59 C. Cls. 318, 321-322; *Lancaster* v. *United States,* 60 C. Cls. 80; *Central R. R. Co. of New Jersey* v. *United States,* 60 C. Cls. 578, *certiorari dismissed,* 270 U. S. 644; *Wabash Ry. Co.* v. *United States,* 59 C. Cls. 322, affirmed, 270 U. S. 1; *Northern Pac. Ry. Co.* v. *United States,* 59 C. Cls. 122; *Western Pac. R. R. Co.* v. *United States,* 59 C. Cls. 67, reversed on other grounds, 268 U. S. 271. The reasoning of the *Southern Pacific* decision was reaffirmed in *Seaboard Air Line Railroad Co.* v. *United States, supra,* which is in turn announced as the authority for the present decision. Accordingly, we direct our arguments here to the grounds stated by the court in the *Southern Pacific* case.

Louisiana wrongful death statue). In *United States* v. *A. S. Kreider Co., supra,* referring to the provision in Section 24(20) of the Judicial Code (now 28 U. S. C. 2401(a)), fixing for Tucker Act suits in the district courts the same general six-year limitation applicable in the Court of Claims, this Court said (313 U. S. at 447):

> We think the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24(20). Clearly, nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions even though they are brought under § 24(20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, require different treatment.

The two-year limitation contained in Section 16(3)(a) is a measure of the carrier's right to sue for its charges; lapse of the specified time destroys the right. *Phillips* v. *Grand Trunk Ry.,* 236 U. S. 662, 667-668; *Louisville Cement Co.* v. *I. C. C.,* 246 U. S. 638, 642; *Kansas City So. Ry.* v. *Wolf,* 261 U. S. 133, 138-140; *William Danzer Co.* v. *Gulf R. R.,* 268 U. S. 633, 636; *Midstate Co.* v. *Penna. R. Co., supra.* In refusing to enforce this limitation in suits against the Government, the court below endows the merely "negative" restriction of 28 U. S. C. 2501 with the power of reviving a cause of action which no longer exists. The six-year limitation in 28 U. S. C. 2501 applies to claims "of which the Court of Claims has jurisdiction * * *." As applied below, this statute has the unintended effect of creating a right where there is no "claim" to which Court of Claims jurisdiction can attach. Cf. *Finn* v.

United States, 123 U. S. 227, 232; *Phillips* v. *Grand Trunk Ry., supra,* at 667.

This result, unwarranted by the principle of statutory construction invoked by the court below, finds equally little justification in any supposedly or actually unique characteristics of the Government as shipper or litigant. In *Southern Pacific Co.* v. *United States, supra,* the Court of Claims supported its refusal to apply the two-year limitation in suits against the Government by pointing to the presence of two exceptions for Government transportation in the Interstate Commerce Act—49 U. S. C. 22, permitting carriers to provide such transportation free or at reduced rates, and 49 U. S. C. 3(2), permitting extension of credit to the Government without authorization by the Interstate Commerce Commission. But these provisions in no way affect either the feasibility or the desirability of requiring carriers to bring suit for their charges within two years. If anything, such explicit exceptions for Government transportation tend to support the conclusion that none were to be implied elsewhere in the Act.[7]

Finally, contrary to the suggestion in *Southern Pacific Co.* v. *United States, supra,* at 401, the carrier is

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[7] This conclusion has been adopted by the Interstate Commerce Commission, the repeated recommendations of which were followed by Congress in enacting, in the Transportation Act of 1920, the limitation provisions in Section 16(3). See the following Annual Reports of the I.C.C.: No. 27 (1913) pp. 80-81; No. 28 (1914) p. 65; No. 29 (1915) p. 68; No. 31 (1917) p. 68. In *United States* v. *Director General,* 80 I.C.C. 143, 150-151, that agency, whose interpretations of Interstate Commerce Act provisions recommended by it to Congress are entitled to even more than their ordinarily "great weight" (*United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549), held that there was nothing in the Act's exceptions with respect to the Government which would warrant implying one where none had been expressed. Indeed, it stressed specific exceptions elsewhere in the Act as a basis for its decision that the language of Section 16 even included the Government as plaintiff.

not hindered in suing the Government, like any other shipper, within two years by the fact that the Government, required to pay transportation bills on presentation (49 U. S. C. 66), may deduct any overpayments from amounts subsequently found to be due the carrier. The carrier's cause of action accrues when it makes delivery. If it is paid no suit is necessary. If it is not paid at all or only paid in part as a result of a deduction because of prior overpayments, the carrier's time to sue runs from the time when the deduction was made, not from the time of the original shipment. Cf. *Wabash Ry. Co.* v. *United States,* 59 C. Cls. 322, 327-328, affirmed, 270 U. S. 1. In such cases, questions relating to earlier shipments, on which the Government claims overpayments were made, would be matters of defense for the Government, not part of the carrier's cause of action for its charges presently withheld in whole or in part.

2. The importance of the question herein, measured in part by the large number of pending suits in which it is presented (see p. 4[ ], *supra*), has recently been enhanced by the Act of June 29, 1949, Pub. L. No. 138, 81st Cong., 1st sess., which adds to Parts II, III, and IV of the Interstate Commerce Act (covering, respectively, motor carriers, water carriers, and freight forwarders) provisions establishing the same limitations as those in Part I, Section 16(3). This statute is designed to establish uniformity among the four parts of the Act. S. Rep. No. 83, 81st Cong., 1st sess., p. 1; H. Rep. No. 766, 81st Cong., 1st sess., pp. 1-2. Referring to the new provisions, substantially identical in phraseology with Section 16(3), the House Committee on Interstate and Foreign Commerce expressly reserved judgment as to whether they "apply to proceedings instituted by the United States but * * * left that question for determination judicially as appropriate

cases may arise." H. Rep. No. 766, *supra*, at p. 2.[8] Earlier, speaking of identical provisions in a predecessor bill (H. R. 2759, 80th Cong., 1st sess.), Chairman Wolverton of the House Committee declared unequivocally that their terms would apply to the Government.[9] These congressional views underline the need for resolution by this Court of a question which now affects the numerous suits against the Government by carriers of all types in both the district courts and the Court of Claims.

* * * * *

FEBRUARY, 1950.

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[8] While the quoted language refers to "proceedings instituted by the United States," it would be absurd to attribute to Congress the belief that the short statute of limitations might bar the United States as plaintiff but afford it no protection as defendant. Cf. *Stanley* v. *Schwalby*, 147 U. S. 508, 515-517.

[9] "Mr. Wolverton. * * * I think it clear that the limitations for which the bill provides would apply to the United States as a shipper, just as to any other shippers * * *. I think, too, that there is every reason why these limitations should apply to the United States the same as to any other shipper." 94 Cong. Rec. 131.

The I. C. C., adhering to its position in *United States* v. *Director General*, *supra*, note 7, shares this view. *Ibid.*

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FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 18

UNITED STATES, *Petitioner*,

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, *Respondents*.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE RESPONDENTS

LAWRENCE CAKE,
1001 Connecticut Avenue, N. W.,
Washington 6, D. C.
Counsel for Respondents.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.

RAYMOND A. NEGUS,
1001 Connecticut Avenue, N. W.,
Washington 6, D. C.
Of Counsel.

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Statutes involved	2
Questions presented	2
Statement	3
Summary of argument	12
Argument	18
I. This case presents no question of interrelationships between courts and commissions, but only an attempt by the Government to obtain an additional advantage over private shippers	19
II. The two year limitation for challenging the reasonableness of a rate before the Interstate Commerce Commission is jurisdictional and limits the Commission's power	23
A. Under an unbroken line of decisions here, the Commission is without power to act after the expiration of the two year period	23
B. The Commission has accordingly ruled that, since its power was terminated by the expiration of the period of limitations, the circumstance that the United States was the complaining party was immaterial	29
C. The rule that the period of limitations is jurisdictional is equally applicable to a judicial reference	31
D. The rule that a longer period of limitations is applicable to suits for overcharges in the Court of Claims was not raised below, was not challenged in the Government's petition for certiorari, and is not open for reexamination here	33
E. There is no unfairness in the result	37

Page

III. This Court has consistently refused to direct a reference to an administrative agency where such reference would save no rights 39

A. Reference to an administrative agency will not be ordered where the agency either lost or never had jurisdiction to determine the issue sought to be referred 39

B. Nothing in the Administrative Procedure Act enlarges the power of the Interstate Commerce Commission to make determinations as to reasonableness after the period of limitations has expired 42

C. Even if a reference were made here, relief for the Government would be very doubtful 45

IV. The Court of Claims properly classified the shipments as incendiary bombs 47

A. The issue of the propriety of summary judgment below, not having been presented in the petition for certiorari, is not open now 47

B. The question is solely one of classification under published tariffs, which the Court of Claims had jurisdiction to determine, and under which issues of reasonableness and unreasonableness were not open to either party 49

C. The record in this case raises no factual issues, and accordingly summary judgment was properly awarded 51

D. Application of well-settled rules of rate classification requires the holding, made below, that the articles in question were properly rated as incendiary bombs 59

(i) The absence of essential parts not affecting the identity of an article offered for transportation does not destroy its fundamental character from a tariff standpoint 59

Page

(ii) The rule for rating combination articles has no application here 64

(iii) The rule of analogy is inapplicable, but would in any event support the classification made by the court below 66

(iv) The applicability or otherwise of the regulations for explosives and other dangerous articles has no bearing whatever on the classification of any articles for rate purposes 70

V. Respondents *Bangor and Aroostook* and *Seaboard Air Line* are not estopped since the Government can show neither reliance, change of position, nor prejudice; and the undisputed facts wholly negative acquiescence 75

Conclusion 83

Appendix—Statutes involved 84

AUTHORITIES

CASES:

Judicial Decisions:

Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227 44

American Ry. Express Co. v. *Price Brothers*, 54 F. 2d 67 49

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 37

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 79

Atchison, T. & S. Fe Ry. Co. v. *United States*, 74 C. Cls. 154 ..... 49, 68

Atchison, Topeka & S. F. Ry. Co. v. *United States*, 81 C. Cls. 346 50

Atchison, Topeka and Santa Fe Ry. Co. v. *United States*, 97 C. Cls. 271 50

Atchison, Topeka and Santa Fe R. Co. v. *United States*, 118 C. Cls. 194 20

Atchison, Topeka and Santa Fe R. R. Co. v. *United States*, 123 C. Cls. 127 50

Page

Atlantic Coast Line Railroad Co. v. *United States*, 140 F. Supp. 569 ..... 20, 34, 38
Chandler v. *United States*, 171 F. 2d 921, certiorari denied, 336 U.S. 918 23
Crancer v. *Lowden*, 315 U.S. 631 ..... 15, 41
William Danzer Co. v. *Gulf R. R.*, 268 U.S. 633 .. 24, 26, 40
Du Pont de Nemours & Co. v. *Davis*, 264 U.S. 456 .. 19, 33
Erie Railroad Co. v. *United States*, 79 C. Cls. 102 .. 49, 69
Ford Co. v. *Dep't of Treasury*, 323 U.S. 459 36
General Talking Pictures Co. v. *Electric Co.*, 304 U.S. 175 35
Great Northern Ry. v. *Merchants Elev. Co.*, 259 U.S. 285 ..... 49, 58
Hanley v. *Donoghue*, 116 U.S. 1 77
Irvine v. *California*, 347 U.S. 128 ..... 18, 35
Jones v. *United States*, 96 U.S. 24 79
Kansas City So. Ry. v. *Wolf*, 261 U.S. 133 ..... 24, 25
Ketchum v. *Dunn*, 96 U.S. 659 79
Lakewood Engineering Co. v. *New York Cent. R. Co.*, 259 Fed. 61 60
Live Oak Assn. v. *Railroad Comm.*, 269 U.S. 354 10
Louisville & N. R. R. v. *Sloss-Sheffield Co.*, 269 U.S. 217 ..... 13, 24, 27, 28, 40
Louisville Cement Co. v. *Interstate Com. Comm.*, 246 U.S. 638 ..... 13, 24, 28, 40
Lynch v. *United States*, 293 U.S. 52 10
Maryland Casualty Co. v. *Jones*, 279 U.S. 792 10
Mazer v. *Stein*, 347 U.S. 201 35
McMicking v. *Schields*, 238 U.S. 99 41
Midstate Co. v. *Pennsylvania R. Co.*, 320 U.S. 356 13, 24, 27, 28
Missouri Pacific R. Co. v. *United States*, 57 C. Cls. 431 20
Mitchell v. *Maurer*, 293 U.S. 237 36
Mitchell Coal Co. v. *Pennsylvania R. R. Co.*, 230 U.S. 247 ..... 31, 39
Montana-Dakota Co. v. *Public Serv. Co.*, 341 U.S. 246 ..... 15, 41, 42
Morrisdale Coal Co. v. *Pennsylvania R. R. Co.*, 230 U.S. 304 ..... 14, 15, 31-33, 37, 40, 43
Motor Cargo, Inc. v. *United States*, 129 C. Cls. 493 .. 49
Nashville, C. & St. L. Ry. v. *Wallace*, 288 U.S. 249 .. 44
National F. Ins. Co. v. *Thompson*, 281 U.S. 331 77

Page

Northern Pacific Ry. Co. v. *United States*, 213 F. 2d 366 33
Oregon-Wash. R. R. Co. v. *United States*, 255 U.S. 339 81
Pennsylvania R. Co. v. *Fox & London*, 93 F. 2d 669.. 49
Pennsylvania R. R. Co. v. *United States*, 70 C. Cls. 276 49
Pennsylvania R. Co. v. *United States*, 129 C. Cls. 781 50
Peters v. *Bowman*, 98 U.S. 56 41
Phillips v. *Grand Trunk Ry.*, 236 U.S. 662 24, 25, 28, 38, 40
Radio Officers v. *Labor Board*, 347 U.S. 17 35
Reconstruction Finance Corp. v. *Spokane P. & S. Ry. Co.*, 170 F. 2d 96 49
St. Louis, B. & M. Ry. v. *United States*, 268 U.S. 169 18, 80, 81
Seaboard Air Line R. Co. v. *United States*, 113 C. Cls. 437, certiorari denied, 338 U.S. 848 .....22, 34
Shutt v. *United States*, 218 F. 2d 10 .....19, 34
Sims v. *Everhardt*, 102 U.S. 300 41
Skelly Oil Co. v. *Phillips Co.*, 339 U.S. 667 44
Smith v. *Hoboken R. Co.*, 328 U.S. 123 .....31, 39
Southern Pacific Co. v. *United States*, 62 C. Cls. 391 22, 34
Southern Pacific Company v. *United States*, 128 C. Cls. 773 10
Southern Railway Co. v. *Tift*, 206 U.S. 428 39
Tacey v. *Irwin*, 18 Wall. 549 41
Tank Car Corp. v. *Terminal Co.*, 308 U.S. 422..31, 39, 40
Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 .....19, 39, 50
Texas & Pacific Ry. Co. v. *Sonken-Galamba Corp.*, 100 F. 2d 158 49
Thompson v. *Texas Mexican R. Co.*, 328 U.S. 134...31, 39
Union Pacific R. Co. v. *United States*, 114 C. Cls. 714, certiorari denied, 339 U.S. 930 .....22, 34
Union Pacific R. Co. v. *United States*, 117 C. Cls. 534 49
Union Pacific Railroad Co. v. *United States*, 117 C. Cls. 757 74
Union Pacific Railroad Co. v. *United States*, 125 C. Cls. 390, final judgment entered, 126 C. Cls. 947 4, 9, 10, 16, 19, 20, 50-59, 64, 66, 67, 69, 72
United States v. *Gulf Ref. Co.*, 268 U.S. 542 ....17, 68, 71

Page

United States v. *Interstate Commerce Commission*, 337 U.S. 426 19
United States v. *Interstate Commerce Commission*, No. 1754-53, D.D.C., Dec. 21, 1955 30
United States v. *Kansas City Southern Railway Co.*, 217 F. 2d 763 33
United States v. *Lindsay*, 346 U.S. 568 20
United States v. *Munsingwear*, 340 U.S. 36 ....15, 23, 38
United States v. *New York, N. H. & H. R. R. Co.*, ... F. 2d .... (C.A. 1, No. 5090, August 10, 1956) ... 20
United States v. *Pink*, 315 U.S. 203 77
United States v. *Reyburn*, 6 Pet. 352 41
United States v. *Summerlin*, 310 U.S. 414 20
Western Pac. R. R. Co. v. *United States*, 255 U.S. 349 81
Wiser v. *Lawler*, 189 U.S. 260 79
Woods v. *Stone*, 333 U.S. 472 36

Interstate Commerce Commission Reports:

Blinn Lumber Co. v. *Southern Pacific Co.*, 18 I.C.C. 430 29
Anaconda Copper Mining Co. v. *Chicago & E. R. R. Co.*, 19 I.C.C. 592 29
Arizona Sand & Rock Co. v. *Southern Pac. Co.*, 280 I.C.C. 285 .....33, 42
Class Rate Investigation, 1939, 262 I.C.C. 447 72
Diamond T Motor Co. v. *Michigan Central R. Co.*, 200 I.C.C. 599 63
J. G. Falls & Co. v. *Chicago, R. I. & P. R. Co.*, 15 I.C.C. 269 .....49, 64
Harris Bros. Co. v. *Director General*, 60 I.C.C. 428.. 61
Heid Bros. v. *El Paso and Northeastern R. Co.*, 55 I.C.C. 416 .....49, 64
Lakewood Engineering Co. v. *Director General*, 57 I.C.C. 311 61
Stewart & Stevenson Services, Inc. v. *Baltimore & O. R. Co.*, 276 I.C.C. 156 .....65, 66
United States v. *Director General*, 80 I.C.C. 143 29
United States v. *Southern Ry. Co.*, 286 I.C.C. 203...29, 30
War Materials Reparation Cases, 294 I.C.C. 5, reconsideration denied, 297 I.C.C. 635 ....16, 29, 30, 45, 50, 73

STATUTES:

Page

Administrative Procedure Act, Section 5(d) ...43, 44, 86
Federal Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955 44

Interstate Commerce Act:

Section 9 19
Section 16(3) 24, 28, 42, 84
Section 16(3)(b) 21
Section 16(3)(d) 24
Section 16(3)(e) 19
Section 16(3)(g) 19
Section 22 ..... 46, 80
R. S. § 914 24
Transportation Act of 1940, Section 322 .....3, 20, 85
5 U.S.C. § 1004 .....43, 86
15 U.S.C. § 47 44
18 U.S.C. § 835 71
28 U.S.C. §§ 2201, 2202 44
49 U.S.C. § 9 19
49 U.S.C. § 16 84
49 U.S.C. § 66 .....2, 3, 12, 20, 38, 42, 85

MISCELLANEOUS:

Attorney General's Manual on the Administrative Procedure Act (1947) pp. 59-60 45
49 C.F.R., Parts 71-78 71
49 C.F.R. (1949 ed.) § 73.342 72
Co. Litt. *127b 41
H. R. Rep. 1980, 79th Cong., 2d sess., p. 31 45
Sen. Doc. 248, 79th Cong., 2d sess., pp. 25, 204, 263.. 45
Sen. Rep. 752, 79th Cong., 1st sess., p. 18 45

Supreme Court Rules:

Rule 38(2) of 1939 35
Rule 23(1)(c) of 1954 35
Rule 40(1)(d)(2) of 1954 .....35, 36, 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 18

UNITED STATES, *Petitioner,*

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, *Respondents.*

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Claims in all three cases (R. 84-86) is reported at 132 C. Cls. 115 and 131 F. Supp. 919.

JURISDICTION

The judgment of the Court of Claims in the *Western Pacific* case (R. 85) was entered on June 7, 1955. On the same day, entry of judgments in the *Bangor and Aroostook* and *Seaboard Air Line* cases was suspended pending determination of the exact amounts due (R. 85). A motion for rehearing in all three cases was denied on October 4, 1955 (R. 87). Judgments in the *Bangor and Aroostook* and *Sea-*

board Air Line cases were entered on November 8, 1955 (R. 87-89). The petition for certiorari was filed on December 9, 1955, and granted on January 23, 1956. The jurisdiction of this Court rests on 28 U.S.C. § 1255(1).

STATUTES INVOLVED

The statutory provisions involved are set forth in the Appendix, *infra*, pp. 84-86.

QUESTIONS PRESENTED

1. Whether, where suit is brought in the Court of Claims to recover transportation charges, most of which were deducted by the General Accounting Office pursuant to 49 U.S.C. § 66, the reasonableness or appropriateness of which the United States has never questioned before the Interstate Commerce Commission, it is error for the Court of Claims to refuse to refer the suit to the Commission or to stay the suit pending action to enable the United States to institute a proceeding before the Commission, where it appears that, by reason of limitations, the Commission has lost jurisdiction to entertain such a proceeding.

2. Whether steel bomb bodies filled with incendiary gels, without bursters and fuzes, should be classified and rated as incendiary bombs, or (a) as combination articles consisting of bomb bodies, gasoline, and soap powder or other chemicals, or (b), alternatively, as analogous to dummy bombs, empty bombs, or other articles of the 5th class.

3. Whether a carrier can be estopped from recovering undercharges from a shipper where the original quotation of a lower rate by the Official Classification Committee was rescinded, where there is a complete absence of proof of reliance by the shipper on such lower rate, and where indeed the shipper first paid the bills at the higher rate.

STATEMENT

In 1944, 1948, and 1950, the three respondent railroads severally shipped, for the United States, over 200 shipments of incendiary bombs, filled with Napalm gel, but without bursters and fuzes, and billed the United States therefor "incendiary bombs" under Item 1820 of the Consolidated Freight Classification No. 17 (R. 1-6, 23-41, 43-51, 56-63).

After the bills of respondents *Bangor and Aroostook* and *Seaboard Air Line* were paid, the General Accounting Office, acting pursuant to Section 322 of the Transportation Act of 1940 (49 U.S.C. § 66; *infra*, p. 85), made deductions against these respondents' subsequent bills, on the footing that the articles in question were combination articles under Rule 18 of the same classification, consisting of bomb bodies, gasoline, and soap powder or other chemicals, and so entitled to shipment at lower rates (R. 44-50, 63-68). The bills of respondent *Western Pacific* were originally paid at the lower rate (R. 1, ¶ 3; R. 5-6).

All three respondents then brought the present suits in the Court of Claims, seeking to recover undercharges, i.e., the difference between the bills as rendered and the bills as paid in the *Western Pacific* case (R. 1-2A), and the amount of the deductions in the other two cases (R. 23-42, 54-61). It is admitted that the *Western Pacific* suit was brought within six years of the time that the transportation services were rendered (R. 3, 5, Item 4), and that the other two were brought within six years of the time that the deductions were made (R. 43, 44, Item 4; R. 56-63, Item 4).[1]

[1] The Government here correctly states (U.S. Br. 13, n. 7) that "The record is silent * * * as to the dates when the Government, which originally paid Bangor and Seaboard the higher rate, undertook to recoup by deductions from amounts due for later transportation service." But since, as indicated, it was admitted that the deductions were made within six years of the time that suit was filed, the exact date is of course immaterial.

In the *Western Pacific* case, it was agreed by the parties that the shipments there involved were of "articles described as incendiary bombs without fuzes and bursters, being like the articles transported in the *Union Pacific* case No. 49505, previously decided by this Court on April 7, 1953" (R. 5). Similar admissions were made in the *Bangor and Aroostook* and the *Seaboard Air Line* cases (R. 43, 44, Item 3; R. 56, 63, Item 3).

In the *Union Pacific* case *(Union Pacific R. Co.* v. *United States,* 125 C. Cls. 390, final judgment entered, 126 C. Cls. 947), the Court of Claims had made findings of fact as follows (125 C. Cls. at 395-396, 400-401, 402-404):

"3. (a) The above articles described by the symbols M76 (PT1) were steel bomb bodies of the type described in War Department Technical Manual TM 9-1980—'Bombs for Aircraft'—as follows:

> "BOMB, incendiary, 500-lb., AN-M76, consists of the body for the 500-lb., G. P. bomb modified for field assembly of burster and igniter, and loaded with a gasoline gel-magnesium mixture. As released the bomb weighs 475 pounds, including 180 pounds of incendiary mixture.

"The steel bomb bodies were filled with PT1 gel, which is commonly called 'Goop' and is described in War Department Field Manual FM 3-6—'Employment of Air Chemical Munitions'—as follows:

Symbol	Name	Description and Physiological Effects
PT1	Incendiary Mixture PT1	Grayish-black solid consisting of IM, scrap magnesium, oxidizing agent, petroleum distillates, and gasoline. Difficult to extinguish. Burns fiercely and relatively fast. Rate of burning is dependent upon amount of oxidizing agent.
IM	Incendiary	Gel of isobutyl methacrylate polymer in gasoline. Burns evenly and is rather easy to extinguish if attacked soon enough.

"(b) The above article described by the symbols M47 A2 (NP) were steel bomb bodies of the type described in War

Department Technical Manual TM 9-1980—'Bombs for Aircraft'—as follows:

> BOMB, incendiary, 100-lb., AN-M47A2, is loaded with a 40-pound charge of gelled gasoline IM or NP. The complete round weighs 69 pounds.

"Such steel bomb bodies were filled with NP gel, which is described in War Department Field Manual FM 3-6—'Employment of Air Chemical Munitions'—as follows:

Symbol	Name	Description and Physiological Effects.
NP	Incendiary Oil NP	Gel of Napalm in gasoline. Napalm is mixture of metallic soaps. Properties similar to IM.

"(c) All the above articles described by the symbols M76 and M47 A2, consisting of bomb bodies of the types specified, filled with PT1 or NP gel as stated, were packed and shipped without the fuzes, bursters or other mechanisms used to open the bomb bodies and scatter and ignite the contents.

* * * * * *

"8. The Chemical Corps (formerly the Chemical Warfare Service) of the Department of the Army has produced and is producing bombs to disseminate three basic types of agents: incendiaries, smokes, and toxics. There are many types of bombs within the three classifications, depending upon the specific application. Incendiary bombs are primarily of the anti-matériel type. They are designed to set fire to inflammable structures such as dwellings and industrial installations.

"9. A completed incendiary bomb, capable of functioning as such in the field, consists of a bomb body or shell filled with inflammable material, such as the PT1 or NP gel, and equipped with a burster and fuze to open the bomb body and scatter and ignite the inflammable material. The burster is a steel tube inserted in the nose of the bomb and extending through its center. The burster contains a

small central well in which there is inserted a ¼-inch column of pelleted tetrol or TNT. The burster tube also contains a column of white phosphorus, which is poured in as a liquid and allowed to solidify. The function of the explosive is to open the bomb case and scatter the contents. The white phosphorous ignites in the air when blasted out by the explosive charge and is the element which ignites the gel. The fuze is a device in the nose of the bomb which, on impact, sets off a primer cap with a small explosion sufficient to fire the burster. The burster and fuze are inserted after the bomb body is filled with gel. The insertion of the burster and fuze is a simple mechanical operation which can be done by an enlisted man in the field and consists merely of screwing in the bursting tube and snapping in the fuze.

"10. Although the PT1, NP, and IM gasoline-thickened gels are highly inflammable, they are not self-igniting. A bomb body filled with the gel, but without the burster and fuze would not function as an incendiary bomb. If a bomb body filled with either the PT1 or NP gel were dropped from an aeroplane, the following results would occur; the M47, which has a thin case, would shatter, and the contents would be scattered over a small area; the M76, which has a much heavier case, would probably not be ruptured if it fell on soft ground. Ignition would not result from the impact, and there would be no change in the chemical composition of the contents of either bomb.

* * * * * *

"12. The Bureau of Explosives is an agency of the railroads which enforces regulations of the Interstate Commerce Commission governing the transportation of explosives and other dangerous articles. As part of its duties, the Bureau publishes such regulations in the form of a tariff, which does not purport to classify any articles or commodities for the purpose of assessing charges for their transportation, but merely sets forth the rules which have been approved by the Interstate Commerce Commission for

the packing, marking, loading, and handling of certain explosives and other dangerous articles. The regulations in effect in 1945 were published as Agent W. S. Topping's Freight Tariff No. 4, which in Section 59 provided as follows:

59 AMMUNITION, CHEMICAL, EXPLOSIVE

(a) Chemical ammunition used in warfare is all kinds of explosive chemical projectiles, shells, bombs, grenades, etc., loaded with toxic, tear, or other gas, smoke, or incendiary agents; also such miscellaneous apparatus as cloud-gas cylinders, smoke generators, etc., that may be utilized to project chemicals.

(b) When these articles are shipped assembled with their ignition elements, bursting charges, detonating fuzes, or explosive components they must be shipped in conformity with the regulations prescribed for explosive articles, class A, see sec. 57. For shipment of these articles not containing ignition elements, burstcharges, detonating fuzes, or other explosive components, see secs. 330, 342, and 364.

* * * *

"Section 330 of the tariff, referred to in the above-quoted paragraph, related to the shipment of bombs and shells containing poisonous gases or liquids but not equipped with ignition elements, bursting charges, detonating fuzes, or explosive components. Section 364, also refered to in the foregoing paragraph, related to the shipment of tear gases. Section 342 of the tariff pertained to the transportation of less dangerous poisons, which were defined in Section 336 as follows:

LESS DANGEROUS POISONS—CLASS B—LIQUID-POISON LABEL

(a) Poisonous liquids (including pastes and semisolids) are substances of such nature that they are chiefly dangerous by external contact with the body or by their being taken internally as in contaminated food or feeds.

(b) The vapors of some of this class of materials are also offensive or dangerous, but to a much less extent than class A poisons.

"Section 342 read as follows:

PACKING

(a) Chemical ammunition consisting of projectiles, shells, bombs, grenades, and other containers filled with gases, liquids, or chemicals, class B, without ignition elements, bursting charges, detonating fuzes, or other explosive components, must be packed for shipment in strong outside wooden or metal boxes. Boxes must be marked with name of contents and labeled as prescribed by these regulations for gases, liquids, or chemicals contained therein.

(b) Chemical ammunition, when shipped as such, must not be equipped or packed with explosive or ignition elements. (See Secs. 55 and 57 for explosive chemical ammunition.)

"Although a number of the bills of lading for the shipments involved here were stamped with the words 'Dangerous' or 'Explosives' (finding 11), there was no provision in Agent Topping's Freight Tariff No. 4 which required such notations on the bills of lading, nor did the tariff require that the articles be packed or marked as dangerous explosives.

"13. During the time of the shipments referred to herein, the War Department had in effect a supply bulletin, No. SB 55-6, which was described as a Freight Billing Guide for the application of the Consolidated Freight Classification to Chemical Warfare Service items. The first page of the bulletin contained the following statement:

This freight billing guide was compiled for the use of Transportation officers and their organizations. The bill of lading descriptions shown herein are to be used

in preparing and issuing bills of lading in accordance with paragraph 14*o* (2), AR 55-150, in order to facilitate settlement of transportation charges.

"The bulletin listed bombs of the M76 and M47 types under the heading 'Bomb, Incendiary' and included a direction that such bombs should be described on bills of lading as 'incendiary bombs' with reference to Consolidated Freight Classification No. 16, Item 1820.

"14. The gel with which the M76 and M47 bombs were filled is a very viscous material. The only opening in the bomb bodies is a small hole in the nose, and it would be extremely difficult to remove the gel from the bomb. The gels used in these and other types of bombs are not interchangeable, a special kind of gel being used for each type of bomb, and the bomb bodies themselves are not interchangeable. On one occasion, the Army attempted to recover the gasoline from the gels contained in a quantity of recaptured incendiary bombs. The attempt was not successful, and no process or method has since been developed for separating the gels into gasoline and the original thickening agents. The M47 and M76 bomb bodies when filled with gels, but without the bursters and fuzes, have no purpose or use except as incendiary bombs."

After making the foregoing findings, the Court of Claims in the *Union Pacific* case held (125 C. Cls. at 393, 111 F. Supp. at 268):

"We are of the opinion that when a steel bomb body, such as the M76 or M47 A2, is filled with an incendiary gel, such as PT1 or NP, it is an incendiary bomb, regardless of whether it contains a burster and fuze. While the absence of the burster and fuze admittedly renders the shipment of the article less hazardous from a transportation standpoint, the only logical description of such an article is as an incendiary bomb. The articles as described on the bills of lading were incendiary bombs without bursters and fuzes, and they had no purpose or use except as incendiary bombs."

The United States did not seek certiorari in the *Union Pacific* case, but, on the basis of the decision therein, stipulated judgment in *Southern Pacific Company* v. *United States,* 128 C. Cls. 773.

Accordingly, respondents moved for judgment on the pleadings or for summary judgment in all three of the present cases, on the footing that, in view of the *Union Pacific* case, there remained no question of law or fact to be tried (R. 6-7, 52-53, 70-71).

The United States opposed the motions on three grounds, as follows:

(a) It filed numerous affidavits, principally by government employees, as to the nature and characteristics of the articles now in question (R. 8-22, 72-83), the substance of the affidavits being that the *Union Pacific* decision was wrong.[2]

(b) The Government asked the Court of Claims either to refer the cases to the Interstate Commerce Commission for a determination of the reasonableness of the incendiary bomb rate, Item 1820, as applied to the incendiary bombs without bursters or fuzes here in question, or, in the alternative, that the cases be stayed to permit the Government to litigate the issue of reasonableness before the Commission.[3]

---

[2] The statements in the Government's brief (U. S. Br. 5-7, 28-32) as to the characteristics of the shipments in issue are drawn exclusively from these *ex parte* affidavits. We show below in the course of the argument, pp. 51-58, *infra*, that none of the Government's affidavits raises any question of fact, as distinguished from questions of opinion and interpretation.

[3] Such request appears, not in the printed record here, but only at p. 38 of the brief filed by the Government below in opposition to plaintiff's motion for judgment on the pleadings or for summary judgment in the *Western Pacific* case, No. 42-54 in the Court of Claims. It is of course plain that a brief is no part of a record, whether the judgment reviewed is that of a federal (*Maryland Casualty Co.* v. *Jones,* 279 U. S. 792, 796) or of a state court (*Lynch* v. *United States,* 293 U. S. 52, 54; *Live Oak Assn.* v. *Railroad Comm.*, 269 U. S. 354). But since the Court of Claims dealt with the request on its merits, we do so here.

(c) The Government contended that *Bangor and Aroostook* and *Seaboard Air Line* were estopped to establish the applicability of Item 1820 for the shipments now in question, on the ground that, for a short time in 1943 and thereafter, the Official Classification Committee, an agency of all the railroads, informally ruled that these articles should be rated by analogy as empty aerial bombs under Item 1895 (R. 80-82). That ruling was subsequently rescinded and admitted to be a mistake by the Committee (R. 85). The record contains no evidence showing reliance by the Government on the ruling of the Official Classification Committee. It is conceded that both respondents concerned billed the Government at the higher, Item 1820, rate, and were paid at that rate, after which deductions were made (R. 85; U. S. Br. 7, n. 3), nor is it disputed that the Government continued to make shipments at the higher rate (R. 85; U. S. Br. 7, n. 3).

The Court of Claims granted respondents' motions for summary judgment (R. 84-85). It held, as to the basic issue (R. 84):

> "These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States*, 125 C. Cls. 390. A reconsideration of the question of classification of the articles as 'bombs or mines' under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case."

With respect to the request for suspension of the cases pending reference to the Interstate Commerce Commission for a determination of the reasonableness of the rates, the Court of Claims held that the Government's rights were barred by limitations (R. 84-85).

And the Court of Claims held that there was no estoppel against the *Bangor and Aroostook* or the *Seaboard Air*

Line, because the Government was neither misled nor injured; nor any acquiescence, because the railroads billed and were paid the higher rate and brought timely suit after the deductions were made (R. 85).

Two judges dissented (R. 86), saying that the Government should be allowed to "prove, if it can, that the objects in question are not incendiary and that to name them incendiary bombs for the purpose of these tariffs is to misname them." There was no suggestion by the dissenting judges that the Government's request for a reference to the Interstate Commerce Commission should or could have been granted, or that the respondents *Bangor and Aroostook* or *Seaboard Air Line* were estopped.

After denial of motions for new trial below (R. 87), this Court granted certiorari (R. 98).

SUMMARY OF ARGUMENT

I. This case presents primarily an effort by the Government, which already has three advantages over the orginary shipper, to obtain still a fourth advantage.

Shippers' complaints as to rates and charges fall into two classes, those alleging unreasonableness, which are cognizable only by the Interstate Commerce Commission, and those alleging overcharges. The latter are subject to a two year statute of limitations generally, except in the Court of Claims, where the period is six years; and except when the Government as shipper brings suit, in which event the United States is not bound by any limitations. Nor is the Government bound by limitations when it sets off alleged overcharges by way of counter-claim. And the Government has a third advantage, its right of unilateral administrative set-off by the Comptroller General under 49 U. S. C. § 66.

The correctness of such set-offs made in this case was contested here, and now, the Court of Claims having held

them to be not justified, the Government seeks belated resort to the Commission, alleging the unreasonableness of the rate, which no court can adjudicate. In asking that it be permitted to avail itself of a remedy it advisedly eschewed, it is now asking for a fourth preference over private shippers. Moreover, since the period of limitations before the Commission has been held to be jurisdictional, limiting the power of the Commission, it is asking for relief that the Commission cannot grant. There is therefore no question of interplay between courts and commissions, because, as will be shown, this Court has never yet directed reference of administrative questions to a commission when no rights could be saved thereby.

The Government had ample opportunity here to test the reasonableness of the challenged rate in an orderly proceeding, timely brought, which would have invoked the expertise of the Interstate Commerce Commission. It chose instead to rely on the fiat of the General Accounting Office. Having failed to establish the correctness of the Comptroller General's notions of transportation rates, it cannot now ask this Court to invent a remedy not available to other shippers, *viz.*, a belated appeal to the administrative body earlier ignored, particularly when that body now lacks power to afford relief.

II. A. Under an unbroken line of decisions in this Court, which have never evoked even a dissenting vote, the Commission is without power to entertain a complaint alleging unreasonableness of a rate after the two year statute of limitations has run. The lapse of the statutory period not only bars the remedy but destroys the liability; it is a limit set to the power of the commission; it is jurisdictional. *E.g., Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U. S. 638; *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 227; *Midstate R. Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356.

B. The Interstate Commerce Commission has accordingly ruled that, on the basis of the decisions here—which followed earlier views of the Commission itself—it has no power to entertain an untimely complaint even when brought by the Government. This necesarily follows from the cases in this Court, which hold that the period of limitations goes, not to the standing of the litigant, but to the power of the Commission.

C. Since the limitations provision is jurisdictional, it is equally applicable to a judicial reference as distinguished from an independent proceeding. Accordingly, no such reference will be made after the statutory period has expired. *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304, 314-315. This controlling decision, which is not even cited by the Government here, is likewise ignored by the lower court cases relied on by the Government that are in conflict with the holding below on this point.

D. Just as the United States is not bound by limitations when it sues or counterclaims for overcharges, so the carriers, it has been held for thirty years, may sue for undercharges in the Court of Claims within the general six year limitation applicable there. This Court has twice refused to review the latter line of rulings. Their correctness was not challenged below in this case, nor presented in the Government's petition for certiorari here. That question is therefore not open now, and the Government's belated attempt to raise it at this junction is contrary to the Rules and the settled practice here. And whether a two or a six year limitation is applicable to a particular class of suits in the Court of Claims is hardly "jurisdictional" within the rule that new questions cannot be raised in briefs on the merits.

E. There is no unfairness in the result; the Government is not put to any disadvantage *vis-à-vis* other shippers; they too would lose a defense based on unreasonableness if they applied too late to the Commission. Since the Gov-

ernment chose to invoke the views of the General Accounting Office as to transportation rates in preference to the expert judgment of the Interstate Commerce Commission, it cannot now ask this Court to do what by orderly procedure it could have done for itself. *United States* v. *Munsingwear*, 340 U. S. 36, 40, 41.

III. A. This Court has consistently refused to direct a reference to an administrative agency when such reference would save no rights. Normally, of course, the rule is that, where a suit involves questions of reasonableness arising under the Interstate Commerce Act—which of course are subject to the exclusive jurisdiction of the Interstate Commerce Commission—the court must stay its hand until the Commission has passed on those questions. But such a reference will not be ordered when the administrative agency has lost power to act by reason of limitations (*Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304), or where the Commission has already determined the issues (*Crancer* v. *Lowden*, 315 U. S. 631), or where the agency concerned never had power to act (*Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U. S. 246).

B. Nothing in the Administrative Procedure Act enlarges the power of the Interstate Commerce Commission to make determinations as to reasonableness after the period of limitations has expired. Section 5(d) of that measure, authorizing the issuance of declaratory orders "with like effect as in the case of other orders," plainly does not enlarge jurisdiction. The declaratory judgment remedy, as this Court has held, is procedural only and does not affect jurisdictional requirements. Therefore, since the Commission here lost power to act after expiration of the period of limitations, the extension to it of the declaratory order power did not help, as the legislative history of the Administrative Procedure Act shows. The sole report of a Division of the Commission to the contrary disregards not only that history but controlling decisions of this Court as well.

C. Assuming *arguendo* only that a reference could be made, examination of *War Materials Reparation Cases,* 294 I. C. C. 4, reconsideration denied, 297 I. C. C. 635, shows that the rates in force were entirely reasonable, and that accordingly any relief for the Government would in any event be extremely doubtful.

IV. A. The issue of the propriety of summary judgment below, which was not presented in the Government's petition for certiorari, is not open now under the settled practice of this Court.

B. The substantive question here is solely one of classification under published tariffs, which the Court of Claims had jurisdiction to determine, and under which issues of reasonableness and unreasonableness were not open to either party.

C. The Government admitted that the articles in question here were the same as those involved in the earlier incendiary bomb case, *Union Pacific R. Co.* v. *United States,* 125 C. Cls. 390. Comparison of the Court of Claims' findings of fact there with the affidavits adduced by the Government in opposition to respondents' motions for summary judgment here establishes that those affidavits contain no single new fact that is legally relevant, but involve simply questions of opinion and interpretation.

D. Application of well-settled rules of rate classification requires the holding that incendiary bombs less bursters and fuzes are properly rated as incendiary bombs, since the absence of essential parts not affecting the identity of an article offered for transportation does not destroy its fundamental charter from a tariff standpoint.

The rule of rating combination articles, relied on by the General Accounting Office in making the deductions here in issue, does not, it has been repeatedly held, apply to articles that have the characteristic of an entity—as these do, because the incendiary gel cannot except with great

difficulty be removed from the bomb body once it is put inside, nor can the gel be separated into its original components at all.

The rule of analogy does not apply either, but, if applicable, would support the ruling below, since the articles shipped are more nearly described as incendiary bombs than as dummy bombs or empty bombs.

The applicability or otherwise of the regulations for explosives and other dangerous articles has no bearing whatever on the classification of these or any other articles for rate purposes. *United States* v. *Gulf Ref. Co.*, 268 U. S. 342, 350. And the mere fact that incendiary bombs without bursters and fuzes are less hazardous is not controlling, since, even when the reasonableness of a rate is properly under consideration, hazard is simply one factor out of many that must be taken into account in determining whether particular rates are just and reasonable. Moreover, in its attempt to minimize the essentially deadly character of the articles now in question, the Government makes several misleading references that improperly equate Napalm gel, the fearsome jellied gasoline, with Napalm less the gasoline, which is only the inert granulated soap that serves as the thickening agent.

V. Respondents *Bangor and Aroostook* and *Seaboard Air Line* are not estopped, since the Government can show neither reliance, change of position, nor prejudice. The record shows no reliance on the admittedly mistaken ruling of the Official Classification Committee, soon rescinded, that the articles here in question were rateable by analogy as empty bombs. Any suggestion that the Government relied on that ruling to ship by rail rather than by truck is at least purely speculative and in large measure even imaginary. Indeed, insofar as the record shows any reliance by the Government in these cases, in any aspect, it shows that the Government relied on the bills at the higher rate which these two respondents presented, inasmuch as it originally

paid those bills at that rate. And since, once deductions were thereafter made, respondents sued within the period of limitations, there was no acquiescence on their part which bars them now. *St. Louis B. & M. Ry.* v. *United States,* 268 U. S. 169, 174-175.

ARGUMENT

Apart from two additional points first raised in the Government's brief on the merits pursuant to the disapproved "practice of smuggling additional questions into a case after we grant certiorari" (Jackson, J., in *Irvine* v. *California,* 347 U. S. 128, 129), this case presents primarily an effort by the Government, which already has three advantages over the ordinary shipper, to obtain another advantage heretofore denied all shippers.

Once the statutory scheme that provides remedies for shippers who deem themselves aggrieved by a carrier's transportation charges or practices is examined, it becomes plain that the case now under consideration involves no question whatever of the interrelationship of courts and commissions, and that it does not concern in the slightest "the precept that courts and administrative agencies are designed to serve as 'collaborative instrumentalities of justice'" (U. S. Br. 23).

On the contrary, the present litigation constitutes an instance of an attempt by the Government, after its use of administrative fiat as a unitary instrumentality of arbitrariness has been judicially condemned, to obtain another remedy which it did not earlier choose to use when it was available, and which is now beyond the power of the administrative agency concerned to grant.

We therefore turn, at the outset, to an examination of the comprehensive remedial machinery that Congress has provided for shippers who complain of carriers.

I. THIS CASE PRESENTS NO QUESTION OF INTERRELATIONSHIPS BETWEEN COURTS AND COMMISSIONS, BUT ONLY AN ATTEMPT BY THE GOVERNMENT TO OBTAIN AN ADDITIONAL ADVANTAGE OVER PRIVATE SHIPPERS.

It is fundamental in transportation law that a shipper's complaints as to rates and charges by carriers fall into two classes—those involving the alleged unreasonableness of rates or practices, and those involving overcharges, which latter are defined by Section 16(3)(g) of the Interstate Commerce Act (*infra* p. 85) as "charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission."

Complaints setting forth unreasonableness are, of course, cognizable only by the Commission, under a long line of cases beginning with *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. That rule was applied by the court below in the *Union Pacific* incendiary bomb case, 125 C. Cls. at 394, and, by plain implication, in this case as well. Indeed, far from being questioned here, it is the starting point for both parties' positions in the present litigation.

Complaints by shippers claiming overcharges stand on a different footing:

The ordinary shipper, having a claim against a carrier for overcharges, has a two year period to sue following delivery of the shipment, subject to an exception not here material, and has the option of bringing suit or filing a complaint with the Commission. Section 16(3)(e) of the Interstate Commerce Act, *infra* p. 85.

The Government, it has been held, is not bound by this two year period if it goes to court.[1] *DuPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Shutt* v. *United States*, 218 F. 2d 10 (C. A. 5). This follows from the general proposition that the United States, as sovereign, is not

[1] For the duty to elect, see Section 9 of the Act (49 U. S. C. § 9) and *United States* v. *Interstate Commerce Commission*, 337 U. S. 426.

bound by statutes of limitations, *e.g., United States* v. *Summerlin,* 310 U. S. 414, except of course where it is specifically named in the statute. *United States* v. *Lindsay,* 346 U. S. 568. This freedom from limitations, very plainly, gives the Government its first advantage over private shippers.

The Government has a second advantage over the ordinary shipper. When it is sued by a carrier for an undercharge, the United States may counterclaim for overcharges, regardless of limitations, and it has in fact availed itself of this right. *Atlantic Coast Line Railroad Co.* v. *United States,* 140 F. Supp. 569 (C. Cls., May 1, 1956).

Finally, the Government has a third advantage over private shippers, one which seems to be almost invariably used; that is the unilateral set-off permitted the United States by Section 322 of the Transportation Act of 1940 (49 U. S. C. § 66, *infra* p. 85), pursuant to which the Comptroller General simply deducts from a carrier's subsequent bills any overcharges which he determines to have been present in prior bills already paid. That remedy was availed of in the *Union Pacific* incendiary bomb case, 125 C. Cls. at 391-392, 398-399 (Fdg. 5), and against the *Bangor and Aroostook* and *Seaboard Air Line* in this case (U. S. Br. 7).

While, of course, the respondent carriers last named were plaintiffs below, still, since they brought the present actions to recover the deductions made, it is the United States that is in the position of a plaintiff in respect of such deductions, and accordingly the burden of proof here is on the United States. *United States* v. *New York, N. H. & H. R. R. Co.,* ..... F. 2d ..... (C. A. 1, No. 5090, decided August 10, 1956); *Atlantic Coast Line Railroad Co.* v. *United States,* 140 F. Supp. 569, 572 (C. Cls.); *Atchison, Topeka and Santa Fe R. Co.* v. *United States,* 118 C. Cls. 194, 200; *Missouri Pacific R. Co.* v. *United States,* 57 C. Cls. 431, 446.

The Government now seeks a fourth advantage over other shippers, namely, a longer period for resort to the Commission now that the grounds of its unilateral administrative set-off have once again been judicially condemned.

As we point out below in more detail, pp. 23-30 *infra*, the two year limitation for resort to the Commission for a determination of the reasonableness of the rate, Section 16(3)(b) of the Act (*infra* p. 84), has been uniformly construed, by the Commission as well as by this Court, to be jurisdictional in the sense of terminating the Commission's power in the premises. Therefore, in now asking that the present case be referred to the Commission for a determination as to reasonableness of the challenged rate, long after the Commission has lost power to consider that issue, the Government is not only asking that it be permitted at this time to avail itself of a remedy which earlier it advisedly eschewed, and that it be given a fourth preference over non-Government shippers, it is also asking for relief that is not within the Commission's power to grant.

There is therefore no question here of interplay between courts and commissions. As we show below, pp. 39-42, this Court has never yet directed reference of administrative questions to a commission when no rights could be saved thereby. It follows in consequence that what is presented is the bald proposition that, when the Government has studiously avoided timely resort to the Commission for a determination of reasonableness, and has attempted but failed to collect alleged overcharges by means of the Comptroller General's power of set-off, it may change its position at that juncture, and then seek belated access to the Commission.

It is argued at length (U. S. Br. 15, *et seq.*) that it is unfair to permit the carrier six years to sue the United States in the Court of Claims and yet hold the United States to a two year period before the Commission for a determination as to reasonableness. But this argument

blurs the vital distinction between overcharges and other damages.

Issues of reasonableness are only for the Commission. When a carrier sues for undercharges, or a shipper for overcharges, questions of reasonableness are, plainly enough, not open for judicial determination. In such suits for overcharges or undercharges, the period of limitations is two years for both sides, Sections 16(3)(a), 16(3)(c), *infra* p. 84, except when the Government sues or counterclaims as a shipper, in which event there are no limitations (*supra* pp. 19-20), and except where a carrier sues the Government in the Court of Claims, when the general six year statute applies. *Southern Pacific Co.* v. *United States,* 62 C. Cls. 391; *Seaboard Air Line R. Co.* v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U. S. 848; *Union Pacific R. Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U. S. 930.

If the cited rulings are deemed "unfair" (U. S. Br. 18, 22) by Congress, in that they give carriers an advantage in respect of Government shipments, or if the rule that the United States is not bound by limitations is similarly "unfair" in giving the Government an advantage over other shippers in respect of suits or counterclaims for overcharges, the remedy is for Congress. The circumstance that the rulings last cited have been acquiesced in for a generation, and that this Court has twice declined to review them, should be persuasive evidence that, if they are now to be changed, only the Congress should do so.[2]

The Government had ample opportunity here to test the reasonableness of the challenged rate in an orderly proceeding, timely brought, which would have invoked the

[2] We point out below, pp. 33-37, that the Government's present contention that the rulings in question are wrong and that the Court of Claims had no jurisdiction to entertain the present case at all (U. S. Br. 13-14, 43-58) was not raised in its Petition for Certiorari and is accordingly not open at the present juncture.

transportation expertise and informed judgment of the Interstate Commerce Commission. It chose instead to rely on the fiat of the General Accounting Office. Having failed in contested proceedings to establish the correctness of the Comptroller General's notions of railroad rate classification, it cannot ask this Court to invent, without statutory sanction, a remedy that is plainly unavailable to other shippers, *viz.*, a belated appeal to the administrative body that the Government earlier ignored. Here, as in *United States* v. *Munsingwear*, 340 U. S. 36, 40, the United States "did not avail itself of the remedy it had to preserve its rights." It therefore has no just cause for complaint now.

Just as the acts of a traitor broadcasting enemy propaganda "cannot be blown up into a great issue of civil liberties" (*Chandler* v. *United States*, 171 F. 2d 921, 939 (C. A. 1), certiorari denied, 336 U. S. 918), so the Government's belated preference for commission determination after its arbitrary set-off has failed, and after the power of the commission concerned to make a determination has ceased, cannot be inflated and distorted into any question of the proper interrelationship of courts and commissions as collaborative instrumentalities of justice.

II. THE TWO YEAR LIMITATION FOR CHALLENGING THE REASONABLENESS OF A RATE BEFORE THE INTERSTATE COMMERCE COMMISSION IS JURISDICTIONAL AND LIMITS THE COMMISSION'S POWER.

A. Under an unbroken line of decisions here, the Commission is without power to act after the expiration of the two year period.

The heart of the present case is the nature of the limitations provision for challenging the reasonableness of a rate before the Interstate Commerce Commission. The Government, which cites only a few of the decisions here, and carefully refrains from ever setting out the *ratio decidendi* of even those few, concludes that the provision does not bar the United States from obtaining a determination as to the reasonableness of a rate after expiration of the period of limitations (U. S. Br. 15-27). But, once all of the authori-

ties are examined, once the reasoning of this Court's decisions on the point is looked to, it becomes plain that the period of limitation contained in Section 16(3) of the Interstate Commerce (*infra*, p. 84), is, under a long and consistent line of rulings here, jurisdictional, in the sense that it deprives the Interstate Commerce Commission of power to entertain such a complaint thereafter. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662; *Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U. S. 638; *Kansas City So. Ry.* v. *Wolf*, 261 U. S. 133; *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633; *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217; *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356.[3]

The rule was first announced in *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, *supra*, a case involving overcharges. There the plaintiff in error, a shipper, sued to recover overcharges based on a prior determination by the Commission that the charges it had paid were unreasonable. Although the suit was brought beyond the statutory period then permitted for suit on a commision order, the shipper contended that it was not barred under the local practice and the conformity act (R. S. § 914). This Court denied recovery, saying (236 U. S. at 667):

> "But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability (*Finn* v. *United States*, 123 U. S. 227, 232) whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction."

In the next case, *Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U. S. 638, *supra*, the same rule was applied to a question of reasonableness. There the question

[3] The exception contained in Section 16(3)(d), *infra*, p. 84, is not relevant to the present case.

was whether a shipper's action to complain of unreasonable rates accrued when the shipment was made or when the overcharges were paid; the latter was held correct, and mandamus was awarded accordingly. But this Court, agreeing with the Commission, held that the two year period of limitations was jurisdictional. The Court said (246 U. S. at 642):

> "It is thus made very clear that the holding of the Commission was not that, having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent it related to the overcharges paid on February 1, 1911, was dismissed.
>
> "We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional,—is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion (*Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544). That such was the opinion of this court was clearly intimated in *Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U. S. 662, 667, and it conforms in principle to the holdings of the court with respect to a similar limitation, but for six years, on the jurisdiction of the court of claims (*Ford* v. *United States*, 116 U. S. 213; *Finn* v. *United States*, 123 U. S. 227, 232; *United States* v. *Wardwell*, 172 U. S. 48, 52)."

The question next arose in another overcharge case, *Kansas City So. Ry.* v. *Wolf*, 261 U. S. 133, *supra*, where a shipper commenced suit for overcharges more than three years after the shipments and payments therefor had been made. No question of reasonableness was involved. Judgment for the shipper was reversed on the authority of *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, *supra*, the Court saying (261 U. S. at 139-140):

> "True it is that the claim of Phillips & Co. was based upon schedule tariff charges theretofore declared to be

unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the *Phillips* case and the reasoning advanced to support it, we think, are applicable to the circumstances of the instant cause. The lapse of time had destroyed any liability by the carrier to the shipper or his assignee for the alleged overcharges, and the demurrer should have been sustained."

In the next case, *William Danzer Co.* v. *Gulf R. R.*, 268 U. S. 633, *supra*, an action was brought to recover the amount of damages awarded against the carrier by the Interstate Commerce Commission. It was held that the provision of Transportation Act, 1920, to the effect that the period of Federal control of the railroads in World War I should not be computed as a part of the limitations period of the Interstate Commerce Act, could not be given effect to revive claims already barred, as the lapse of time destroyed the right and not merely the remedy. Therefore to allow the claim would be to create a liability retroactively and thus to deprive the defendant of its property without due process of law. Accordingly, judgment for the defendant was affirmed, this Court saying (268 U. S. at 636-637):

"Plaintiff's right to file his claim with the commission had expired several months before the passage of the Transportation Act. But, if the period of federal control is to be excluded, the complaint was filed within time. During the period between such expiration and the passage of the Transportation Act, plaintiff had no right to file a claim with the commission, and had no cause of action. It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff. *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 666; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 642; *Kansas City Southern Ry.* v. *Wolf*, 261 U. S. 133, 139. On the expiration of the two-year period, it was as if liability had never existed. * * *

"We need not re-examine the doctrine of *Campbell* v. *Holt*, 115 U. S. 620, as it is plain that case does not apply. * * * The decision [there] rests on the conception that the obligation of the debtor to pay was not destroyed by lapse of time, and that the statute of limitations related to the remedy only, and that the removal of the bar was not unconstitutional. The opinion distinguishes the case from suits to recover real and personal property. That case belonged to the class where statutory provisions fixing the time within which suits must be brought to enforce an existing cause of action are held to apply to the remedy only. But such provisions sometimes constitute a part of the definition of a cause of action created by the same or another provision, and operate as a limitation upon liability. Such, for example, are statutory causes of action for death by wrongful act. [Citing cases.] This case belongs to the latter class. * * *"

Similarly, in *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 267 U. S. 217, *supra*, a suit by a shipper to recover the amount of a reparation order entered by the Interstate Commerce Commission for excessive freight charges, the Court held that it was not fatal to the cause of action that the shipper filed a more detailed statement of claim after the expiration of the two years where the proceeding had been commenced within the two years, although, speaking through Mr. Justice Brandeis, it restated the principle herein discussed, saying (269 U. S. at 227), "It is true that the two-year requirement is jurisdictional."

More recently, in *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, the question was whether the parties, by agreement, could waive the statutory period of limitations, in an action brought by a carrier against a shipper to recover freight charges. This Court held that, since the statute barred the right, the period of limitations could not be waived. The Court said (320 U. S. at 363-364):

"* * * the decisions have fixed the pattern, in respect to a variety of issues relating to application of the limitations, that lapse of the statutory period 'not

> only bars the remedy but destroys the liability.' That is true of this Court's decisions and those of the inferior federal courts. It is true of suits by shippers against carriers and of suits by carriers against shippers."

The Government "questions" (U. S. B. 14, 21) the correctness of the conclusion below (R. 84-85) that its request for a reference came too late, urging (U. S. B. 25-27) that the limitations provisions of Section 16(3) of the Act (*infra* p. 84) does not run against the sovereign. No one will question that, in general, the United States is not bound by limitations. But here the issue concerns, not the standing of the litigant, but the power of the tribunal. Here, under an unbroken line of decisions in this Court, none of which has ever evoked so much as a dissenting vote, the expiration of the two year period terminates the power of the Commission to act. It is for that reason that the United States is in the same position as any other shipper. And the Government's contrary views in the present case can be explained only on the footing that it completely ignores—for assuredly it nowhere mentions—the *ratio decidendi* of the limitations cases. For aught that appears in the Government's brief, the consistent rulings by this Court that the lapse of the statutory period "not only bars the remedy but destroys the liability" (*Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662, 667; *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 363), that it is "a limit set to the power of the Commission" (*Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U. S. 638, 642), that "the two-year requirement is jurisdictional" (*Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 227), simply were never made. But it is only by thus completely shutting its eyes to the plainly expressed basis of an unbroken line of decisions that the Government can fashion its present argument.

B. The Commission has accordingly ruled that, since its power was terminated by the expiration of the period of limitations, the circumstance that the United States was the complaining party was immaterial.

Accordingly, since the limitation is jurisdictional, since it bars the right, since it limits the power of the Commission—a concept which, it is significant to note, was first formulated by the Commission itself in two early reports (*Blinn Lumber Co.* v. *Southern Pacific Co.*, 18 I. C. C. 430, 431; *Anaconda Copper Mining Co.* v. *Chicago & E. R. R. Co.*, 19 I C. C. 592, 594)—the conclusion necessarily follows that the sovereign's preferred status in other situations, where it is immune from ordinary limitations that go to standing to sue, is inapplicable. And the Interstate Commerce Commission has accordingly ruled, on the basis of the decisions of this Court discussed above, that it has no power to entertain an untimely complaint even when it is brought by the United States. *United States* v. *Director General*, 80 I. C. C. 143; *United States* v. *Southern Ry. Co.*, 286 I. C. C. 203; *War Materials Reparation Cases*, 294 I. C. C. 5, 12, reconsideration denied, 297 I. C. C. 635.

In the report first cited, the Commission ruled (80 I. C. C. at 150-151):

> "We have no jurisdiction to award reparation against the Wharton on interstate shipments delivered or tendered for delivery more than two years prior to the dates on which the complaints were filed with us and we make no finding with respect to the rates charged thereon. It is fundamental that we act only under the jurisdiction conferred upon us by the Congress. The power to award damages for violations of the act created rights as well as remedies. Failure to assert the right within the statutory period not only bars the remedy but destroys the right. *Phillips* v. *Grand Trunk Railway*, 236 U. S. 662; *Louisville Cement Co.* v. *Int. Com. Comm.*, 246 U. S. 638. In this respect the statute differs from the ordinary statute of limitations which, when invoked, bars only the remedy. The United States Government was not specifically excepted from the statutory requirement

> with respect to the time within which complaints for the recovery of damages must be filed with us, although it is specifically excepted from other provisions of the act."

The foregoing ruling was reapplied in *United States* v. *Southern Ry. Co.*, 286 I. C. C. 203, *supra*, where, after quoting the excerpt from the earlier case set out immediately above, the Commission said (p. 205):

> "That interpretation stood without challenge for many years, in the course of which the Congress twice reenacted section 16(3). We see no reason for now adopting a different interpretation."[4]

The Commission's view that the period of limitations in Section 16(3)(b) is binding on the Government was most recently reaffirmed in *War Materials Reparation Cases*, 294 I. C. C. 5, reconsideration denied, 297 I. C. C. 635, *supra*. There the Commission said 294 I. C. C. at 12: "The complainant [United States of America] contends that the Government is impliedly excepted from that provision. We have consistently refused to accept such an interpretation, our most recent decision being *United States* v. *Southern Ry. Co.*, 286 I. C. C. 203."

Here again, the Government's questioning of the correctness of these rulings (U. S. Br. 21) rests on its failure to appreciate the basis of this Court's decisions on which those rulings were expressly rested, namely, that the expiration of the period of limitations terminates the power of the Commission.

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[4] Affirmed, *United States of America* v. *Interstate Commerce Commission and United States of America*, Civil Action 1754-53, D. D. C., McGuire, J., December 21, 1955, unreported. In view of its affirmance of the Commission on the merits, the court considered the limitations point to be moot. No appeal was taken.

C. The rule that the period of limitations is jurisdictional is equally applicable to a judicial reference.

Insofar as it deals with the limitations cases at all, the Government argues that those few which it sees fit to cite were independent proceedings, and did not involve any question of referral to an administrative agency (U. S. Br. 19, 20-21).

But since the limitations provision is jurisdictional, limiting the power of the Commission, it would seem plain on principle that the Commission is equally without power whether its aid is invoked by a litigant in an independent proceeding, or by a court that, pursuant to well-settled doctrine (e. g., *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134; *Smith* v. *Hoboken R. Co.*, 328 U. S. 123; *Tank Car Corp* v. *Terminal Co.*, 308 U. S. 422; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247), suspends proceedings to obtain the Commission's administrative determination of reasonableness when such an issue arises in a pending judicial proceeding.

What appears plain on principle is indeed equally plain on authority, for this Court has specifically ruled—in a case neither cited nor discussed by the Government—that a court will not be directed to refer a matter to the Commission after the time for the Commission to make the administrative determination has expired. *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304.

In the *Morrisdale Coal Co.* case, the shipper brought suit for damages against the carrier, seeking damages for what was alleged to be a discriminatory apportionment of cars during a car shortage. No prior determination of reasonableness having been sought from the Commission, the case was dismissed. The shipper argued that, if failure to make application to the Commission was, as held, jurisdictional, then the case should not be dismissed, but should be stayed to permit application to the Commission. But this Court held that, since such application was barred

by limitations, there was no basis for a reference to the Commission. The Court said (230 U. S. at 314-315):

> "It is argued in the plaintiff's brief that if this view of the law should be sustained the case should not be dismissed but stayed until the plaintiff could apply to the Commission and obtain a ruling on the question as to whether the method adopted by the Pennsylvania Railroad was not, during the years 1900 to 1906 unjustly discriminatory. Attention is called to *Southern Ry.* v. *Tift*, 206 U. S. 428, 434, which it is said would support such a provision in the mandate. In that case the shippers filed, on April 14, 1903, a bill to enjoin an advance in rate. The injunction was refused and the advance went into effect. The cause was stayed while the complainants were pressing their application for an order from the Commission that the rates were unreasonable. Its report was in their favor and on it the Circuit Court made an order of restitution (206 U. S. 436). But, in that case the statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States Circuit Court. The damages which were claimed arose from a failure to deliver cars prior to December 31, 1905. The suit was brought July 17, 1908, more than two and a half years later, and after the passage of the act of June 29, 1906, 34 Stat. 584, 590, c. 3591, that 'all complaints for the recovery of the damages shall be filed with the Commission within two years from the time the cause of action accrued, and not after and a petition for the enforcement of an order shall be filed in the Circuit Court within one year from the date of the order and not afterwards; Provided that claims accrued prior to the passage of this act may be presented within one year.'
>
> "The provisions of this statute would prevent the modification asked for, and the judgment is *Affirmed.*"

We consider that the *Morrisdale Coal Co.* case, which has never been modified or questioned, is controlling here, and that it requires affirmance of the Court of Claims on the first question presented by the Government.

There are no persuasive authorities to the contrary. Both of the Eighth Circuit decisions relied on by the Government (U. S. Br. 21-22) ignore the decisive *Morrisdale Coal Co.* case. *United States* v. *Kansas City Southern Railway Co.*, 217 F. 2d 763; *Northern Pacific Ry. Co.* v. *United States*, 213 F. 2d 366. They can accordingly hardly be regarded as weighty. The same is true of a solitary ruling of the Interstate Commerce Commission, *Arizona Sand & Rock Co.* v. *Southern Pac. Co.*, 280 I. C. C. 285, also decided, so far as appears from the report, in the same utter unawareness of the *Morrisdale Coal Co.* case.[5]

In short, not only the Government, but also the scattered authorities on which it relies (U. S. Br. 21-24), ignore the one decision of this Court that is precisely in point. Whether this curious coincidence reflects silent acquiescence in our view that *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304, is determinative here, or whether that similarity of position is a consequence of only sketchy acquaintance with the authorities, is not for respondents to say.

D. The rule that a longer period of limitations is applicable to suits for overcharges in the Court of Claims was not raised below, was not challenged in the Government's petition for certiorari, and is not open for reexamination here.

The general rule that the limitations provisions of the Interstate Commerce Act are jurisdictional has not always been consistently applied to judicial proceedings for the recovery of over- or undercharges. Thus, in *DuPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, this Court held that an action to recover demurrage charges, brought on behalf of the Director General as representative of the United States, was not barred by limitations because of the sovereign's traditional immunity from such defenses.

[5] We point out below, pp. 42-45, that, contrary to the Commission's assumption there, nothing in the Administrative Procedure Act enlarges the power of the Commission to entertain a reference once the period of limitations has run.

Accord: Shutt v. *United States,* 218 F. 2d 10 (C. A. 5). Similarly, the Court of Claims has recently held that the Government's counterclaim for railroad overcharges would be entertained regardless of the time when its cause of action accrued. *Atlantic Coast Line Railroad Co.* v. *United States,* 140 F. Supp. 569 (May 1, 1956).

By parity of reasoning, the Court of Claims has consistently held, for some thirty years, that suits by carriers in that court to recover unpaid balances from the United States as shipper were limited only by the six year statute there applicable. *Southern Pacific Co.* v. *United States,* 62 C. Cls. 391; *Seaboard Air Line R. Co.* v. *United States,* 113 C. Cls. 437, certiorari denied, 338 U. S. 848; *Union Pacific R. Co.* v. *United States,* 114 C. Cls. 714, certiorari denied, 339 U. S. 930.

As the last two citations show, this Court twice refused to review the Court of Claims' holdings as to the scope of its jurisdiction in that regard (Nos. 212 and 580, Oct. T. 1949).

In the present case, the Court of Claims' jurisdiction to entertain respondents' suits was not questioned there,[6] nor was the question of that court's jurisdiction presented in the Government's Petition for Certiorari here (No. 559, Oct. T. 1955).[7]

Now, however, the Government seeks to raise this precise question (U. S. Br. 13-14), and devotes the entire

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[6] "* * * the Court of Claims has consistently held that the two-year limitation period established [by Sec. 16(3)] does not apply to suits brought by carriers against the United States. [Citing the two cases in which certiorari was denied at the 1949 Term.] This ruling, which was not challenged in the instant cases because of the prior decisions, opened the way to consideration of the claims against the United States here asserted by respondents." U. S. Pet. 11-12, in the present case.

[7] The estoppel point, though not listed among the questions presented, was duly reserved. U. S. Pet. 3, n. 1.

Appendix to its brief (U. S. Br. 43-58) to excerpts from its denied petitions for certiorari in the earlier cases, Nos. 212 and 580, Oct. T. 1949.

We doubt whether the files of this Court will disclose any similar attempt to serve up warmed-over arguments after a lapse of nearly seven years. But the conclusive answer to the Government's effort to enlarge the scope of review in this case at this time is that this Court's rules join with its unbroken practice in forbidding what has very properly been characterized as a "practice of smuggling additional questions into a case after we grant certiorari" (Jackson, J., in *Irvine* v. *California*, 347 U. S. 128, 129).

It has long been settled that "One having obtained a writ of certiorari to review specified questions is not entitled to obtain decision on any other issue." *General Talking Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 179. That doctrine was first codified in Rule 38(2) of 1939, 306 U. S. 717: "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." Repeatedly and recently reaffirmed (*e.g., Radio Officers* v. *Labor Board*, 347 U. S. 17, 37, n. 35; *Mazer* v. *Stein*, 347 U. S. 201, 208), it was restated in the present Rules at two places.

Rule 23(1)(c), prescribing the arrangement of the petition for certiorari, states specifically that "Only the questions set forth in the petition or fairly comprised therein will be considered by the court." And Rule 40(1)(4)(2), dealing with briefs, goes on to say that "The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents."

Here the Government's excuse for now raising an additional question in square violation of the Rules is (U. S.

Br. 13-14) the contention that "the court is always free to consider, of its own motion, jurisdictional questions * * *."

Plainly, there is no such exception, certainly not in such broad terms. Once past the jurisdiction of this Court, which is of course always open, there must be a lack of jurisdiction in the court below based upon the public policy set forth in the Eleventh Amendment (*Ford Co.* v. *Dep't of Treasury*, 323 U. S. 459, 467) or upon the limitations of federal jurisdiction generally (*cf. Mitchell* v. *Maurer*, 293 U. S. 237, 244). The jurisdiction of the lower court must be, as one Justice has expressed it, "plainly wanting."[8]

It may well be doubted whether the issue now sought by the Government to be injected in this case—which, after all, is simply whether a two or a six year statute of limitations is applicable to a particular class of claims against the United States—is jurisdictional in the sense that the immunity declared by the Eleventh Amendment, or the constitutional restrictions upon the scope of federal judicial power, may be deemed jurisdictional for purposes of carving an exception out of the rule that a brief on the merits may not raise new questions.

But, in any event, it certainly cannot be contended here, in the face of an unbroken line of rulings in the Court of Claims for thirty years to the effect that it does have jurisdiction of these cases, that its jurisdiction still is "plainly wanting." Nor, after this Court has twice advisedly refused to review the precise issue, can it fairly be urged that by mere lapse of time what was then left undisturbed has now ripened into "plain error" within the meaning of Rule 40(1)(d)(2). Even if the point were

[8] "I had supposed that no rule of judicial administration was better settled than that the Court should restrict itself to the questions presented in a petition for certiorari. * * * The exceptions to this rule are rare, as where the jurisdiction of this Court or of the lower courts is plainly wanting, or where a patent error *in favorem vitae* is to be noted." Frankfurter, J., concurring, in *Woods* v. *Stone*, 333 U. S. 472, 478.

open for decision on the merits, the circumstance that the Court of Claims decisions from 1926 on survived the general revision of the limitations provisions effected by the Transportation Act of 1940 would, on familiar principles, amount to congressional ratification thereof. *Cf. Apex Hosiery Co.* v. *Leader,* 310 U. S. 469.

But the point is not open. There is no warrant whatever for the Government's present effort to reopen, seven Terms out of time, two of its denied petitions for certiorari. And we submit that this Court should discountenance the Government's injection into this case, in violation of the Rules and practice of the Court, of questions not put forward in its petition for certiorari.

E. There is no unfairness in the result.

The Government attacks the result below, urging (U. S. Br. 14) that in being now denied access to the Commission it is inhibited in its defense of the suits brought by respondents, and that (U. S. Br. 20) it "loses a defense available to all other shippers."

But the defense in question is that the charges are unreasonable, a defense which, as the Government itself recognizes (U. S. Br. 16-17), cannot be availed of in a court. That issue, plainly, can be determined only by the Commission. And if a private shipper sought to have a judicial proceeding stayed to permit an issue of unreasonableness referred to the Commission after the Commission, by reason of limitations, had lost its power to make a determination thereon, the private shipper would lose its defense too. *Morrisdale Coal Co.* v. *Pennsylvania R. Co.,* 230 U. S. 304, *supra.* The ruling below, therefore, does not place the Government in a more disadvantageous position by comparison with other shippers.

Indeed, the Government in at least one respect is in a substantially better position than a private shipper sued by a carrier for undercharges. In that situation, any set-

off that the private shipper desires to assert against the carrier is, necessarily, subject to limitations. E. g., *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662. But the Government can successfully set off a claim for overcharges regardless of when that claim accrued. *Atlantic Coast Line Railroad Co.* v. *United States,* 140 F. Supp. 569 (C. Cls.)

Thus weak in point of law, the Government resorts to adjectives. It characterizes the result below as "anomalous" (U. S. Br. 14), as "uneven" (U. S. Br. 19) and "grossly uneven" (U. S. Br. 11, 16), complains of "unfairness" (U. S. Br. 18), and concludes on the crescendo of "gross unfairness" (U. S. Br. 22).

But, if the situation is dispassionately viewed, there is no unfairness. The United States chose to avail itself of the right, not open to other shippers, to make set-offs under 49 U. S. C. §66.[9] Whether that right represents the sturdy exercise of "self-help," as the Government characterizes it (U. S. Br. 19), or whether, as a host of Court of Claims judgments evidence, it is essentially arbitrary in its operation, we need not now pause to discuss. The point is that, having invoked the views of the General Accounting Office on transportation rates in preference to the informed and expert judgment of the Interstate Commerce Commission thereon at a time when the Commission still had power to express an opinion, the Government can hardly now be heard to complain of unfairness—nor to insist that, after all, this is a Commission matter.

Here, as in *United States* v. *Munsingwear,* 340 U. S. 36, 40, the United States "did not avail itself of the remedy it had to preserve its rights." Here, as in the *Munsingwear* case (340 U. S. at 41), "The case is therefore one

[9] It is said (U. S. Br. 20) that this procedure "results in the settlement of numerous controversies without the necessity of litigation." What this means, of course, is that a good many victims of the Comptroller General's actions under that provision are in no position to litigate, not that they agree with his determinations.

where the United States, having slept on its rights, now asks us to do what by orderly procedure it could have done for itself."

There is simply no basis now for affording the United States a fourth advantage over private shippers (*cf.* pp. 19-23 *supra*), particularly where, as has been amply demonstated, the advantage sought is beyond the power of the agency concerned to grant.

III. THIS COURT HAS CONSISTENTLY REFUSED TO DIRECT A REFERENCE TO AN ADMINISTRATIVE AGENCY WHERE SUCH REFERENCE WOULD SAVE NO RIGHTS.

A. Reference to an administrative agency will not be ordered where the agency either lost or never had jurisdiction to determine the issue sought to be referred.

Ever since *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, it has been settled law that, in any action seeking damages for alleged violations of the Interstate Commerce Act, courts have no jurisdiction to determine questions of reasonableness which may be involved in such lawsuits and that jurisdiction to determine such questions is vested exclusively in the Commission. And ever since *Southern Railway Co.* v. *Tift*, 206 U.S. 428, decided at the same Term, it has likewise been settled that, where the suit involves questions of reasonableness arising under the Act, it is proper to suspend proceedings to permit the Commission to adjudicate such questions. Later decisions have hardened the permissive into the mandatory; where the reasonableness or legality of the practices of the parties was subject to the exclusive jurisdiction of the Commission, the court must stay its hand until the Commission has passed on the mater. See, e.g., *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 147; *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422, 433; *Smith* v. *Hoboken R. Co.*, 328 U.S. 123; *Mitchell Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U.S. 247, 267, all cited at U.S. Br. 17-18.

But each of these cases, and every other decision of this Court relied on by the Government, differs from the case at bar. In none of those cases was there any question as to lack of jurisdiction, by reason of limitations or otherwise, in the administrative agency. In each instance, the question referred was one as to which the agency was competent to give an answer.

Where, however, the time for making application to the administrative agency has expired, then the proceedings will not be stayed, for then no purpose would be served in doing so. *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U.S. 304, discussed *supra*, pp. 31-33. There, as this Court later said, "no rights could be saved by retaining the cause." *Tank Car Corp.* v. *Terminal Co.*, 308 U.S. 422, 433, note 15. The Government's utter failure to refer to the *Morrisdale* case anywhere in its brief necessarily undercuts substantially its present contentions.

The *Morrisdale* case is, if anything, stronger today against the Government's arguments here than when it was decided, by reason of the subsequent formulation of the rule that expiration of the period of limitations deprives the Commission of power. *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662; *Louisville Cement Co.* v. *Interstate Com. Comm.*, 246 U.S. 638; *William Danzer Co.* v. *Gulf R. R.*, 268 U.S. 633; *Louisville & N. R. R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217. Under that rule it is even plainer than it was in 1913, when *Morrisdale* was decided, that there is no basis whatever at this time either for reference of the present case to the Commission by the court below or for suspension of its proceedings to permit the Government independently to apply to the Commission for a determination as to reasonableness. The right so to apply no longer exists, under the decisions cited; and, very plainly, judicial proceedings are not to be stayed for vindication

of non-existent rights. The law does not require courts to perform vain or nugatory acts.[10]

Similarly, reference to the Commission will not be made where the Commission has already determined the issues. *Crancer* v. *Lowden,* 315 U.S. 631. There again, no rights could have been saved.

Likewise, no reference will be made where the administrative agency has no jurisdiction to make the determination that is sought. *Montana-Dakota Co.* v. *Public Serv. Co.,* 341 U.S. 246. In that case, the question was as to the reasonableness of a rate under the Federal Power Act. The district court in which relief was sought had of course no jurisdiction to make such a determination, and under the provisions of the Federal Power Act the Federal Power Commission had no jurisdiction to award reparation. This Court accordingly held that the matter was not one proper for reference to that Commission, saying (341 U.S. at 254):

> "If the court is presented with a case it can decide but some issue is within the competence of an administrative body, in an independent proceeding, to decide, comity and avoidance of conflict as well as other considerations make it proper to refer that issue. But we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly."

We deem the *Montana-Dakota* case likewise controlling in the present litigation. There the Federal Power Com-

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[10] *McMicking* v. *Schields,* 238 U.S. 99, 103; *Sims* v. *Everhardt,* 102 U.S. 300, 310; *Peters* v. *Bowman,* 98 U.S. 56, 60; *Tacey* v. *Irwin,* 18 Wall. 549, 591; *United States* v. *Reyburn,* 6 Pet. 352, 367; Co. Litt. *127b (*Lex non praecipit inutilia*).

mission never had jurisdiction to grant reparation. Here the Interstate Commerce Commission has lost jurisdiction to determine any question of reasonableness. In either case a reference to the commission concerned would be futile.

It is true that *Montana-Dakota* was decided by a closely divided Court. But even espousal of the minority views in that case would not help the Government here. There the dissenting members of the Court, while agreeing that there was no statutory remedy, were of opinion that the district court should none the less fashion one under its equitable powers. See 341 U.S. at 261-266. Here, however, there was a remedy. Here the Government had the right to apply to the Commission for an adjudication on its contention that the rates were unreasonable. But the Government advisedly failed to invoke that right and instead chose to exercise its right of statutory set-off under 49 U.S.C. §66. Having elected one remedy and lost, it cannot now be permitted to revert to its other remedy, which the agency concerned at this time is powerless to grant. In that setting there is no occasion now to recanvass the issues that divided the Court in *Montana-Dakota*.[11]

B. Nothing in the Administrative Procedure Act enlarges the power of the Interstate Commerce Commission to make determinations as to reasonableness after the period of limitations has expired.

The Government relies strongly (U.S. Br. 23-24) on a report of Division 2 of the Commission in *Arizona Sand & Rock Co.* v. *Southern Pac. Co.*, 280 I.C.C. 285, where it was held that the period of limitations contained in Section 16(3) of the Interstate Commerce Act did not preclude the Commission from answering a reference made by a court. Division 2 said (*id.* at 286);

[11] Lest there be even a possibility that silence on the point could be construed as acquiescence, we add here simply that we cannot accept the strained reading of the *Montana-Dakota* case that the Government sets out at U.S. Br. 24.

"Most of the shipments here considered were delivered or tendered for delivery more than 2 years prior to the date of filing of the complaint. The complaint was not filed within 90 days from the time suit was instituted. However, it is the practice of the Commission to assist the court in instances of the kind stated in the order quoted above. Appropriate findings and a declaratory order in proceedings such as this are authorized by section 5(d) of the Administrative Procedure Act, which reads as follows;

" 'DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.' "

Apart from the circumstance that this was a report by a Division rather than the full Commission, the conclusion reached is demonstrably wrong.

First. The report does not consider the controlling case of *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U.S. 304, discussed *supra*, pp. 31-33, which holds squarely that a reference will not be made after the period of limitations has run, nor does it reflect any awareness of the settled rule, see pp. 23-30 *supra*, that the expiration of the period of limitations destroys the power of the Commission.

Second. The report completely misapprehends the scope of Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 1004 (*infra*, p. 86).

That provision must be read in connection with the introductory paragraph of Section 5, as follows:

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved * * * (5) cases in which an agency is acting as an agent for a court; * * * (d) The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

Whether exception (5) in the first paragraph of Section 5 includes the reference now sought by the Government, or whether it is limited to a situation of direct agency, as under the provision authorizing suits under the antitrust laws to be referred to the Federal Trade Commission as a master in chancery (15 U.S.C. §47), we need not stop to inquire, because it is plain that the power to issue declaratory orders does not enlarge jurisdiction.

The federal courts were first given jurisdiction to render declaratory judgments by the Federal Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955, now 28 U.S.C. §§2201, 2202. The operation of that Act, as this Court has said, "is procedural only." *Ætna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240. "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co.* v. *Phillips Co.,* 339 U.S. 667, 671. The range of remedies was enlarged in the sense that the traditional equity requirements of prayer for injunction and allegation of irreparable injury were not necessary to a declaratory judgment. See *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249, 262-263. But the authorization to render declaratory judgments did not, because it could not, also eliminate the normal constitutional requirements requisite to federal jurisdiction, viz., existence of a case or controversy, diversity of citizenship, existence of a federal question, etc. *Skelly Oil Co.* v. *Phillips Co., supra,* 339 U.S. at 671-674.

So here: The mere power to issue declaratory orders, "with like effect as in the case of other orders" (Administrative Procedure Act, Sec. 5(d), *infra* p. 86), does not enlarge the Interstate Commerce Commission's jurisdiction so as to give it power to issue declaratory orders after expiration of the period of limitations, where, under a consistent line of its own rulings and of decisions of this Court, its very power to make any determination terminated when the two year period expired.

It should be added that the foregoing conclusion is entirely consistent with the legislative history of Section 5(d) of the Administrative Procedure Act. See Sen. Doc. 248, 79th Cong., 2d sess., pp. 25, 204, 263.[12] Thus it was said in both committee reports (*id.*, pp. 204, 263), "The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts."[13]

The construction now urged by the Government is not only at variance with the text of the Act and of the Committee reports thereon, it is also at variance with and unsupported by the Department of Justice's contemporaneous interpretation. See *Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 59-60.

Plainly, therefore, if the Commission had no jurisdiction before the effective date of the Administrative Procedure Act, it had none thereafter.

C. Even if a reference were made here, relief for the Government would be very doubtful.

Assuming—but only for purposes of argument—that the Commission still had power to determine the reasonableness of the rates now in question, relief for the Government would be, at the very least, extremely problematical, as *War Materials Reparation Cases,* 294 I.C.C. 5, reconsideration denied, 297 I.C.C. 635, shows.

There the Commission considered seventeen complaints filed by the Government which alleged that the rates and charges for handling Government freight during the war years 1941 to 1946 were unjust and unreasonable, including two cases, Docket Nos. 29822 and 29861, that involved ammunition (including incendiary bombs), explosives, and ammunition components.

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[12] A document collecting all of the hearings, committee reports, and floor debates on the measure.

[13] Sen. Rep. 752, 79th Cong., 1st Sess., p. 18; H. R. Rep. 1980, 79th Cong., 2d sess., p. 31.

All of the latter shipments were handled by the railroads for the Government under Section 22 agreements at approximately 65 per cent of first-class rates, without land grant deductions. 294 I.C.C. at 137-146. It is pointed out in the Commission's report (*id.*, at 139) that during the period included in the complaints the rating on these commodities generally ranged from Class 32½ to Class 75 [i.e., percentages of first class], and that in Montana-Pacific territory and transcontinental territory commodity rates prevailed to an important extent; that at the request of the War Department the railroads made a Section 22 quotation of Class 65 on ammunition and explosives in carloads, minimum 50,000 pounds, applicable throughout the United States, not subject to land grant deductions; and that the quotation appeared to have been reasonably satisfactory to the Government officials chiefly concerned until some time in 1945.

With respect to the factor of hazard, the Commission said (294 I.C.C. at 144):

> "How much should be included in the rates in recognition of hazard is necessarily a matter of judgment. The amount could not be measured solely by property loss from the handling of this traffic during the war, even if it were possible, as it is not, to make a satisfactory estimate of that amount. It is clear that, everything considered, the item was smaller than it might well have been under the circumstances, but it must be remembered that a major factor in the relatively favorable result was the costly service accorded to this traffic."

The Commission accordingly found that the railroads were not shown to have violated the Interstate Commerce Act in respect of any of the rates, charges, and practices assailed, and in consequence dismissed the Government's complaints.[14]

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[14] We are advised that no proceeding seeking judicial review of the Commission's report in these cases will be filed.

Apart from the consideration last named, which admittedly verges on the speculative, it is clear that, since the Government's right to apply to the Commission for a determination of its contention that the rates involved in the present case are unreasonable has long since ceased to exist, the Court of Claims correctly held that there was no occasion for a reference to the Commission. Its holding in this respect should accordingly be affirmed.

IV. THE COURT OF CLAIMS PROPERLY CLASSIFIED THE SHIPMENTS AS INCENDIARY BOMBS.

A. The issue of the propriety of summary judgment below, not having been presented in the petition for certiorari, is not open now.

At the outset of the substantive issue in the present case—the proper classification of the shipments in question—the Government completely changes its position, and now seeks to obtain decision on still another question that it did not see fit to present in its petition for certiorari.

In that document (Pet. 2-3, Question 2; 19-21), it presented the question decided adversely to it by the Court of Claims, namely, whether the rate for incendiary bombs was applicable to such bombs less bursters and fuzes. Now it all but abandons that point, saying (U.S. Br. 35), "We do not argue that this Court need resolve the question of tariff interpretation."[15] And it shifts to a wholly different issue, and now argues that the Government's affidavits in opposition to respondents' motions for summary judgment demonstrated that there were genuine issues of material fact (U.S. Br. 27-35). It accordingly

[15] Perhaps that admission is tantamount to a concession that certiorari should not have been sought in respect of the question of classification. Certainly it may be ventured with some degree of assurance that, had the decision below been the other way, a petition for certiorari by the carriers to review the Court of Claims' ruling as to the correct interpretation of the tariff would not have been successful.

asks (U.S. Br. 35) "that the Court exercise its supervisory powers to assure the Government its day in court on those issues." No such contentions were even remotely suggested in the petition for certiorari.

Plainly, this is an attempt to "change the substance of the questions already presented" which is expressly forbidden by Rule 40 (1)(d)(2) and by this Court's consistent certiorari practice. See pp. 25-37, *supra*, where the uniform authorities against any such enlargement are set forth and discussed; and of course in this instance there is no suggestion that the new issue now tendered is in any sense "jurisdictional".

We point out below, pp. 51-58, at an appropriate place in our argument as to the correctness of the classification made by the Court of Claims, that analysis of the Government's affidavits submitted in opposition to respondents' motions for summary judgment shows that they did not in fact raise any issues of fact, and that summary judgment below was accordingly amply warranted.

But we submit that it should not be necessary for us even to deal with that issue, which was not involved in this case as it was presented here in the petition for certiorari. If a private party were petitioner, he could not expect with impunity thus to expand the questions open for decision. And private respondents should not be required to have to defend themselves against every contention capable of occurring to successive echelons of Government lawyers as they seek to shore up what on further reflection appears to be a losing lawsuit in the posture in which it was originally presented. We submit that this Court should once more express its disapproval of a course so plainly irregular and so completely unwarranted.

We argue, first, that the question for judicial decision is solely one of classification under published tariffs, under which issues of reasonableness or unreasonableness

are not open; second, that the record discloses no unresolved question of fact (as distinguished from questions of opinion or interpretation), so that summary judgment was properly awarded; and, third, that under well settled rules of rate classification the ruling below was clearly correct.

B. The question is solely one of classification under published tariffs, which the Court of Claims had jurisdiction to determine, and under which issues of reasonableness and unreasonableness were not open to either party.

Respondents were suing for undercharges, contending that petitioner—the shipper—failed to pay the applicable rates (R. 1-2A, 23-41, 54-61). It is settled that the Commission has no jurisdiction of a carrier's claim for unpaid charges, *J. G. Falls & Co.* v. *Chicago, R. I. & P. R. Co.*, 15 I.C.C. 269; *Heid Bros.* v. *El Paso and Northeastern R. Co.*, 55 I.C.C. 416, and it is equally well settled that the courts do have jurisdiction in such cases. *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285; *Reconstruction Finance Corp.* v. *Spokane, P. & S. Ry. Co.*, 170 F. 2d 96 (C. A. 9); *Texas & Pacific Ry. Co.* v. *Sonken-Galamba Corp.*, 100 F. 2d 158 (C. A. 5); *Pennsylvania R. Co.* v. *Fox & London*, 93 F. 2d 669 (C. A. 2); *American Ry. Express Co.* v. *Price Brothers*, 54 F. 2d 67 (C. A. 5).

The Court of Claims has regularly and in many cases been called upon to decide controversies similar to the present one, involving disputes as to the proper classification of an article or commodity under published rates. *Pennsylvania R. R. Co.* v. *United States*, 70 C. Cls. 276 (surgical bandages); *Atchison, T. & S. Fe Ry. Co.* v. *United States*, 74 C. Cls. 154 (airplane pontoons); *Erie Railroad Co.* v. *United States*, 79 C. Cls. 102 (bomb sights); *Union Pacific R. Co.* v. *United States*, 117 C. Cls. 534 (jeeps); *Motor Cargo, Inc.* v. *United States*, 129 C. Cls. 493 (machine gun parts). And in other cases the Court of Claims has construed and applied the published tariffs

to determine whether or not the carrier had been paid in full for the service performed. *Atchison, Topeka & S. F. Ry. Co.* v. *United States,* 81 C. Cls. 346 (minimum carload weights); *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States,* 97 C. Cls. 271 (station index numbers); *Atchison, Topeka & Santa Fe R. R. Co.* v. *United States,* 123 C. Cls. 127 (switching charges); *Pennsylvania R. Co.* v. *United States,* 129 C. Cls. 781 (transit allowances).

It is also settled, by the long line of cases beginning with *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, that the defense of unreasonableness is within the exclusive jurisdiction of the Interstate Commerce Commission. The Court of Claims so held in the earlier incendiary bomb case, *Union Pacific Railroad Co.* v. *United States,* 125 C. Cls. 390, 394, and the Government, which seeks to have that question referred to the Commission, apparently agrees—although its classification argument (U.S. Br. 33-35) is interlarded with contentions going to hazard which are of course simply contentions that the rate held applicable is in fact unreasonable.[16] And the argument of the dissenting judges below (R. 86), when analyzed, amounts simply to a disposition to let the Government prove the unreasonableness of the rate in the Court of Claims.[17]

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[16] The Government throughout its brief (U. S. Br. 2, 7, 12, 16, 27, 34, 36, 37) refers to "high first-class rates". Perhaps the thought is that any rate that is high is in consequence unreasonable, and hence a subject for judicial condemnation. It is however not necessary to pursue this semantic speculation, for the fact—which, it needs hardly to be added, does not appear in the Government's brief—is that the rates on ammunition, explosives, and ammunition components ranged from 32½ to 75 per cent of first class rates and averaged 65 per cent of such rates. *War Materials Reparation Cases,* 29 I.C.C. 5, 137-146, espy. at 139-141, reconsideration denied, 297 I.C.C 635. Even if it can be said that 65% of a first class rate is still necessarily "high", that would only raise a question of reasonableness.

[17] "If the reason for the high freight rate is the incendiary quality of the freight, and if the freight does not have the incendiary quality, the reason for the high rate vanishes and the rate should vanish with it." (R. 86.)

We prefer to rest on what the Court of Claims unanimously held in the first incendiary bomb case, 125 C. Cls. at 394:

> "As previously stated, the hazards involved in the transportation of the shipments for which plaintiff is suing were not as great as would have been the case had the articles been shipped fully assembled. And it may well be that a lower tariff rate should apply to the carriage of the less hazardous incendiary bomb. This question is not within our jurisdiction, however, as the question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission."

And, as we have shown above, pp. 31-33, 39-45, no such reference can now be made, since the Commission's power to determine the tendered issue has ceased to exist.

C. The record in this case raises no factual issues, and accordingly summary judgment was properly awarded.

In order to ascertain what was and what was not before the Court of Claims in the present case, its relationship to the earlier incendiary bomb case must first be examined.

The gist of the Court of Claims' holding in the earlier litigation was (125 C. Cls. at 393):

> "We are of the opinion that when a steel bomb body, such as the M76 or M47 A2, is filled with an incendiary gel, such as PT1 or NP, it is an incendiary bomb, regardless of whether it contains a burster and fuze. While the absence of the burster and fuze admittedly renders the shipment of the article less hazardous from a transportation standpoint, the only logical description of such an article is as an incendiary bomb. The articles as described on the bills of lading were incendiary bombs without bursters and fuzes, and they had no purpose or use except as incendiary bombs."

It was admitted below in this case that the articles in question were like those in the earlier *Union Pacific* case (R. 5, Item 2; R. 43, 44, Item 3; R. 56, 63, Item 3).

The Court of Claims accordingly held in the present case (R. 84) that:

> "These cases present the same questions which the court considered and answered in the case of *Union Pacific Railroad Company* v. *United States,* 125 C. Cls. 390. A reconsideration of the question of classification of the articles as 'bombs or mines' under item 1820 of Consolidated Freight Classification No. 16, leads us to the same conclusion. The facts are the same and no purpose would be served by reciting again the historical facts in our former opinion and the facts in the instant case."

There are no factual differences in the present record that would warrant a different result. Indeed, the "facts" set out in the Government's *ex parte* affidavits below (R. 8-22, 72-83), from which both its statement (U.S. Br. 5-6) and its argument (U.S. Br. 28-33) here are drawn—those "facts", as distinguished from expressions of opinion, do not contradict in the slightest any of the facts found by the Court of Claims in the earlier case.

We set forth immediately below the relevant excerpts from the Government's statement here and the findings of the Court of Claims in the first incendiary bomb case:

Government's Brief	*Union Pacific Findings*
Napalm gel is gasoline which has been thickened or gelatinized by the addition of aluminum soap powders (R. 8, 10, 11, 13). [U. S. Br. 5.]	NP gel • • • is described in War Department Field Manual 3-6—"Employment of Air Chemical Munitions"—as • • • Gel of Napalm in gasoline. Napalm is mixture of metallic soaps. [Fdg. 3(b).]
This mixture is not capable of spontaneous combustion, is not	Although PT1, NP, and IM gasoline-thickened gels are high-

Government's Brief	*Union Pacific Findings*
self-igniting, and is not, therefore, incendiary (R. 8, 9, 10, 12, 13, 76-78, 79); like wood, paper, and a host of other articles, it will burn if ignited, but some outside incendiary agent must be supplied to set it on fire (R. 9, 10-11, 12, 13, 76-78, 79). [U. S. Br. 5.]	ly inflammable, they are not self-igniting. [Fdg. 10.] PT1 and NP, although not self-igniting, are incendiary mixtures • • •. [125 C.Cls. at 392.]
In a completed incendiary bomb, capable of functioning as such, the incendiary agent which ignites the Napalm gel is contained in the burster charge (R. 8, 10, 12, 13, 77). [U. S. Br. 5.]	A completed incendiary bomb, capable of functioning as such in the field, consists of a bomb body or shell filled with inflammable material, such as the PT1 or NP gel, and equipped with a burster and fuze to open the bomb body and scatter and ignite the inflammable material. [Fdg. 9.]
The burster is a steel tube inserted in the nose of the bomb and extending through its center, which contains a column of explosive TNT and a column of white phosphorous (R. 10). [U. S. Br. 5.]	The burster is a steel tube inserted in the nose of the bomb and extending through its center. The burster contains a small central well in which there is inserted a ¼-inch column of pelleted tetrol or TNT. The burster tube also contains a column of white phosphorus, which is poured in as a liquid and allowed to solidify. [Fdg. 9.]
The function of the explosive is to rip open the steel bomb case and scatter its contents. [U. S. Br. 5.]	The function of the explosive is to open the bomb case and scatter the contents. [Fdg. 9.]
The white phosphorous is the incendiary or self-igniting agent, which ignites in the air when	The white phosphorous ignites in the air when plasted out by the explosive charge and is the ele-

Government's Brief	*Union Pacific Findings*
blasted out by the explosive charge and sets the Napalm gel on fire (R. 12, 79). [U. S. Br. 5.]	ment which ignites the gel. [Fdg. 9.]
In addition, a complete incendiary bomb contains a fuze. The fuze is a device in the nose of the bomb which, on impact, sets off a primer *cup* [*sic*] with a small explosion sufficient to fire the burster. [U. S. Br. 5.]	The fuze is a device in the nose of the bomb which, on impact, sets off a primer cap with a small explosion sufficient to fire the burster. [Fdg. 9.]
The burster and fuze represent more than 75% of the construction cost of a complete bomb, whereas the steel case and Napalm filler comprise less than 25% of the cost (R. 10-11). [U. S. Br. 5.]	[No comparable finding]
[Not covered in Government's affidavits]	The burster and fuze are inserted after the bomb body is filled with gel. The insertion of the burster and fuze is a simple mechanical operation which can be done by an enlisted man in the field and consists merely of screwing in the bursting tube and snapping in the fuze. [Fdg. 9.]
It is undisputed that the shipments involved contained neither the burster nor the fuze and that they therefore did not contain either the incendiary element, *i.e.*, the white phosphorous, or the explosive element, *i.e.*, the TNT (R. 5). The only bomb parts shipped, as already noted, were the steel cases filled with	All the above articles described by the symbols M76 and M47 A2, consisting of bomb bodies of the types specified, filled with PT1 or NP gel as stated, were packed and shipped without the fuzes, bursters or other mechanisms used to open the bomb bodies and scatter and ignite the contents. [Fdg. 3(c).]

Government's Brief

gasoline which had been thickened by the addition of aluminum soap powders for the purpose of retarding the gasoline's free-flowing qualities (R. 8-9, 12, 76). [U. S. Br. 6.]

These steel bomb cases filled only with Napalm gel were similar to a "steel container filled with gasoline, with the exception that the Napalm gel filling does not flow as readily as gasoline and if ignited does not burn as rapidly as gasoline" (R. 76). Indeed, a "bomb body filled with Napalm Gel • • • presents considerabl[y] less hazard in transit, from a transportation viewpoint, than a drum filled with gasoline because Napalm Gel will not and can not leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline" (R. 9, 77). [U. S. Br. 6.]

Union Pacific Findings

The above articles described by the symbols M47 A2 (NP) were steel bomb bodies of the type described in War Department Technical Manual TM 9-1980—"Bombs for Aircraft"—as follows:

> BOMB, incendiary, 100-lb., AN-M47A2, is loaded with a 40-pound charge of gelled gasoline IM or NP. The complete round weighs 69 pounds.

Such steel bomb bodies were filled with NP gel, which is described in War Department Field Manual FM 3-6—"Employment of Air Chemical Munitions"—as follows:

Symbol	Name	Description and Physiological Effects
NP	Incendiary Oil NP	Gel of Napalm in gasoline. Napalm is mixture of metallic soaps. Properties similar to IM. [Fdg. 3(b).]

[Properties of IM, Fdg. 3(a): Burns evenly and is rather easy to extinguish if attacked soon enough.]

Government's Brief

In light of these facts, the Bureau of Explosives, which polices the Interstate Commerce Commission's Regulations of "Explosives and Other Dangerous Articles" (49 C.F.R., Parts 71-78, published originally as *Topping's Freight Tariff No. 4* and later as *Campbell's Freight Tar-off No. 8*), has consistently ruled that a Napalm-filled bomb case, shipped, as here, without fuze or burster, is "not a dangerous article" subject to the Regulations and hence is "not required to be shipped in accordance with the • • • regulations" (R. 20, 21). [U. S. Br. 6.]

Union Pacific Findings

The Bureau of Explosives is an agency of the railroads which enforces regulations of the Interstate Commerce Commission governing the transportation of explosives and other dangerous articles. As part of its duties, the Bureau publishes such regulations in the form of a tariff, which does not purport to classify any articles or commodities for the purpose of assessing charges for their transportation, but merely sets forth the rules which have been approved by the Interstate Commerce Commission for the packing, marking, loading, and handling of certain explosives and other dangerous articles. The regulations in effect in 1945 were published as Agent W. S. Topping's Freight Tariff No. 4, which in Section 59 provided as follows:

> 59 AMMUNITION, CHEMICAL, EXPLOSIVE
>
> • • •
>
> (b) When these articles [chemical ammunition used in warfare] are shipped assembled with their ignition elements, bursting charges, detonating fuzes, or explosive components they must be shipped in conformity with the regulations prescribed for explosive articles, class A, see sec. 57. For shipment of these

articles not containing ignition elements, bursting charges, detonating fuzes, or other explosive components, see secs. 330, 342, and 364. * * *

Section 330 * * * related to the shipment of bombs and shells containing poisonous gases or liquids * * *. Section 364 * * * related to the shipment of tear gases. Section 342 of the tariff pertained to the transportation of less dangerous poisons, * * * [and] read as follows:

PACKING

(a) Chemical ammunition consisting of projectiles, shells, bombs, grenades and other containers filled with gases, liquids, or chemicals, class B, without ignition elements, bursting charges, detonating fuzes, or other explosive components, must be packed for shipment in strong outside wooden or metal boxes. Boxes must be marked with name of contents and labeled as prescribed by these regulations for gases, liquids, or chemicals contained therein.

(b) Chemical ammunition, when shipped as such, must not be equipped or packed with explosive or ignition elements. (See Secs. 55 and 57 for explosive chemical ammunition.) ([Fdg. 12.]

In view of the circumstance that the Government in this case admitted that the articles here in question were identical with those shipped in the *Union Pacific* incendiary bomb case (R. 5, Item 2; R. 43, 44, Item 3; R. 56, 63, Item 3), it is thus perfectly clear that the Government's affidavits not only raised no issue of fact, but adduced no new matter that was legally relevant in the present proceedings.[18]

Everything else relied on by the Government (U.S. Br. 28-30) involved expressions of opinion as to the meaning of "incendiary", essentially to the effect that napalm gel should not be deemed incendiary because it is not self-igniting. But this presents nothing new; the Court of Claims, which found that this substance is not self-igniting although highly inflammable (Fdg. 10, 125 C. Cls. at 401), held that it was incendiary none the less (*id.* at 392).

Accordingly, this is not, as the Government supposes (U.S. Br. 30), a difference "as to the nature and characteristics of Napalm gel", but simply an issue of law, of interpretation of the word "incendiary" as used in the tariff, a "dispute * * * merely whether words in the tariff were used in their ordinary meaning, or in a peculiar meaning." *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285, 293. Such a dispute raises no question of fact, and accordingly, even if the question were open—which, as we have shown *supra* pp. 47-49, it was not—the result could only be that the case was a proper one for summary judgment, and that no purpose would have been served by the further hearing that was suggested by the dissenting judges below (R. 86).

The facts are neither disputed nor fairly disputable. To those facts, the Court of Claims, as we shall now show, correctly applied well settled doctrines of classification.

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[18] As has been seen, *supra* p. 54, the only point in the Government's affidavits that was not fully covered in the *Union Pacific* case was the relative value of the bombs with and without fuzes. But that would go only to the reasonableness of the rate.

D. Application of well-settled rules of rate classification requires the holding, made below, that the articles in question were properly rated as incendiary bombs.

Under this heading we show, first, that the absence of essential parts not affecting the identity of an article does not change its character from a tariff standpoint; next, that neither the rule for combination articles nor the rule of analogy is applicable, though the one last-named would support the holding below; and, finally, that whether or not the articles in question were to be regarded as dangerous within the meaning of the regulations as to transportation of explosives has no bearing on their classification for rate purposes.

(i) *The absence of essential parts not affecting the identity of an article offered for transportation does not destroy its fundamental character from a tariff standpoint.*

In the *Union Pacific* case, the Court of Claims found and the Government, far from questioning that finding, presses that point vigorously (U. S. Br. 28-30)—that (Finding 10, 125 C. Cls. at 401; quoted *supra*, p. 6):

> "Although the PT1, NP, and IM gasoline-thickened gels are highly inflammable, they are not self-igniting. A bomb body filled with the gel, but without the burster and fuze, would not function as an incendiary bomb."

The foregoing must be read in conjunction with Finding 14 in the same case (125 C. Cls. at 404; quoted *supra*, p. 9), to the effect that—

> "The M47 and M76 bomb bodies when filled with gels, but without the bursters and fuzes, have no purpose or use except as incendiary bombs."

This portion of Finding 14, likewise, is not questioned by the Government.

Even with the burster and fuze, it should be noted, an incendiary bomb will not function so long as the arming wire with which such bombs are equipped is in place, and if one were dropped equipped with burster and fuze and with the arming wire in place, it still would not function. Moreover, even a complete bomb fully armed, and intended to explode when dropped, might fail to explode or ignite. Consequently, whether an article offered for transportation is immediately capable of functioning for the purpose for which it is made is not necessarily controlling in ascertaining its classification and rating for transportation purposes.

For it is a well established rule in the construction and application of railroad tariffs that the absence of essential parts not affecting the identity of an article offered for transportation does not destroy its fundamental character from a transportation or tariff standpoint.

Thus, in *Lakewood Engineering Co.* v. *New York Cent. R. Co.*, 259 Fed. 61 (C. A 6), the carrier had recovered a judgment for undercharges. The articles shipped were sections of railway track, made of two parallel steel rails, with steel cross ties riveted at each end, but without the plates and bolts necessary to fasten the rails of adjoining sections to each other. Those plates and bolts were packed and shipped separately.

The carrier claimed charges based on an item in the freight classification, "Tracks, portable railway, set up in sections," which was rated in the 5th class. The shipper relied on another item in the published tariff that quoted a lower rate on "New iron and steel rails and iron and steel cross ties." The Circuit Court of Appeals held that the articles shipped were properly classified as "portable railway track set up in sections," and accordingly affirmed the judgment in the carrier's favor. It said (259 Fed. at 62-63):

"We see no room to doubt that the article shipped was 'portable railway track, set up in sections.' * * * While the plates and bolts may be an essential part of a 'ready to sell' section of a portable track, they are plainly but a mere incident or appurtenance to the substantial thing itself. For purposes of definition and classification, a steam engine does not cease to be such because the governor is omitted, nor would shoes be anything but shoes, if shipped without buttons or laces. These sections might have been provided with bolts and plates, but one tie might have been left off, whereby the sections would not have been satisfactory for contract delivery until the missing tie had been supplied, but we think they would still be 'sections of portable railway track'; and the same thought covers the deficiency which here existed."

The result there reached by the Sixth Circuit was also arrived at by the Interstate Commerce Commission in a later case between the same parties involving the same articles. *Lakewood Engineering Co.* v. *Director General,* 57 I.C.C. 311. And the principle of the *Lakewood Engineering* cases has been consistently applied by the Commission in other situations.

Thus, in *Harris Bros. Co.* v. *Director General,* 60 I.C.C. 428, the controversy involved the proper classification of carload shipments from New York to Bellwood, Pa., of second-hand locomotives that were partially dismantled. The carrier charged 4th class rates under the following item of the freight classification:

"Locomotives, Locomotive Tenders, Locomotives and Tender combined, and Locomotives and Cars combined Compressed Air, Electric, Gasoline or Steam:

* * * *

"K.D. (machinery parts boxed) C.L. 4th class."

The complainant contended (60 I.C.C. at 429) "that as many of the more valuable parts were shipped separately, and others were missing, the remaining parts comprising these shipments should have been classified as individually set forth in the classification, in which most of them were accorded fifth class."

The sole question at the hearing was whether the shipments were within the terms of the classification item quoted above. The Commission held that they were, saying (60 I.C.C. at 429-430):

> "The locomotives had been out of use for about seven years, during which time they had been stored in the open unprotected from the elements. From many various detachable parts had been taken and other parts were found useless or broken and discarded. For example, only six of the locomotives had headlights, and various injectors, drive wheels, and pipes, as well as air-hose coupling were missing. * * *
>
> "The locomotives were purchased f.o.b. New York, but it seems to have been incumbent upon complainant to supervise their preparation for shipment. Practically all of the brass parts were shipped to Depew, N. Y. All of the air-brake equipment was segregated and shipped as a separate consignment to Bellwood. The remaining smaller parts were packed in boxes and shipped with the major parts, such as the boilers, frames and trucks to Bellwood. * * *
>
> "The absence of essential parts, not affecting the identity of an article transported does not destroy its fundamental character from a transportation or tariff standpoint. *Lakewood Engineering Co.* v. *Director General,* 57 I.C.C. 311. * * *
>
> "We find that the shipments properly came within the classification description of Locomotives, k.d., and that the fourth class rates were applicable."

A similar question arose in *Diamond T Motor Co.* v. *Michigan Central R. Co.*, 200 I.C.C. 599, where the Commission held that the lack of tires and batteries on a motor chassis did not destroy its identity as such. The Commission said (200 I.C.C. at 599-600):

> "Complainant corporation alleges that the rate charged on a carload of motor-vehicle chassis parts * * * was applicable.
>
> "These parts, weighing 44,900 pounds, constituted seven complete chassis, except batteries and tires. The 4th class rate of 52 cents per 100 pounds was originally charged. Subsequently, defendants presented an undercharge bill based on the rule 25 rate of 75 cents applicable on knocked-down motor vehicle chassis and the provision of rule 20 of the classification, which reads:
>
> > " 'Parts or pieces, constituting a complete article, received as one shipment, on one bill of lading, will be charged at the rating provided for the complete article.'
>
> "The undercharges have not been paid. Complainant contends that rule 20 has no application as the articles shipped did not constitute complete chassis within the meaning of that rule. The lack of tires and batteries did not destroy the identity of the articles as chassis. Under similar circumstances it was found that the rate on the complete article applied. *Lakewood Engineering Co.* v. *Director General*, 57 I.C.C. 311."
>
> * * *
>
> "We find that the shipment consisted of knocked-down motor vehicle chassis, that the applicable rate thereon was 75 cents, and that undercharges are outstanding. The complaint will be dismissed."[19]

[19] This case illustrates how the Commission may find that *undercharges* are outstanding but dismiss the complaint, because the

Under the principle of the foregoing rulings, it is plain that the Court of Claims was correct in holding that the absence of bursters and fuzes from the articles now in question did not affect their identity as incendiary bombs. For, as the court had found (*supra*, pp. 9, 59), without contest by the Government, those articles had no purpose or use other than as incendiary bombs.

(ii) *The rule for rating combination articles has no application here.*

Rule 18 of the freight classification (125 C. Cls. at 391, note 2) provides:

COMBINATION ARTICLES

> "When not specifically classified, articles which have been combined or attached to each other, will be charged at the rating for the highest classed article of the combination, and on shipments subject to CL rating the minimum weight will be the highest minimum weight provided for such highest rating."

In the audit and settlement of the transportation charges on the shipments now in question, the General Accounting Office ruled that the articles shipped should be classified and rated under Rule 18 as "combined or attached" articles composed of (a) bomb bodies, (b) gasoline, and (c) soap powder or other chemical thickening agent (R. 5-6. Item 3; R. 23, ¶ 3, admitted by ¶ 3, R. 51; R. 55, ¶ 6, admitted by ¶ 5, R. 69).

Since the Court of Claims held that the articles in question were "incendiary bombs" within the meaning of Item 1820, it went on to hold (125 C. Cls. at 393) that "we need not consider the contentions of the parties as to the appli-

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Commission has no jurisdiction or authority to order a shipper to make good an undercharge and must leave the carrier to its remedy of a suit against the shipper in the courts. See *J. G. Falls & Co.* v. *Chicago, R. I. & P. R. Co.*, 15 I.C.C. 269; *Heid Bros.* v. *El Paso and Northeastern R. Co.*, 55 I.C.C. 416.

cation of Rules 17 and 18, for these rules do not apply where there is a specific classification."

In so holding, the Court of Claims was clearly correct, for two reasons.

First, Rule 18 by its terms does not apply to articles specifically classified.

Second, Rule 18 does not apply to combinations of articles joined or attached to each other unless the separate parts are so joined together are suitable or adaptable to separate uses. As the Commission said in *Stewart & Stevenson Services, Inc.* v. *Baltimore & O. R. Co.*, 276 I.C.C. 156, 157:

> "It has been held repeatedly that Rule 18 does not apply to articles that have the characteristic of an entity. * * * Its application is to combinations of articles that are suitable or adaptable to separate uses."

That case involved shipments of Diesel engines and propeller shafts, taken from U. S. naval vessels, and described in the bills of lading as "propulsion units." As shipped, the propeller shaft was attached to the engine, and each unit was crated. The rate charged by the carrier, $1.61 cwt, was that applicable to machinery or machines noibn (noibn=not otherwise indexed by name). The shipper contended that there were lower rates, of $1.43 cwt on Diesel engines and of $1.34 on propeller shafts, and that under Rule 18 he was required to pay the higher of those two rates, which was still lower than the rate charged. The Commission held that Rule 18 did not apply, and that the carrier's charge was accordingly correct.

The kind of articles to which Rule 18 would apply would be a combined ironing board and step ladder, a combined chair and step ladder, an air heater and lighting fixture combined, a telephone stand and chair combined with an electric lamp, a screw driver and a flash light combination,

a clock and electric sign. Unless and until a specific entry is put into the classification for the combination, Rule 18 would apply to such combinations.[20]

Very plainly, the articles here in question were not "combined or attached in the foregoing sense. The articles here in question are "articles that have the characteristic of an entity." *Stewart & Stevenson Services, Inc.* v. *Baltimore & O. R. Co.*, 276 I.C.C. 156, 157, *supra.* As Finding 14 in the *Union Pacific* case shows (125 C. Cls. at 404; *supra* p. 9), the articles here in question could not be separated into their component parts. The incendiary gel is a viscous sticky material, hard to manipulate even in the laboratory, and cannot be removed from the bomb bodies once it is put in them without extreme difficulty, nor can the gels be separated into gasoline and the original thickening agents at all. There is no known method for doing so. And the articles in question were made for use as incendiary bombs and had no other purpose or use.

(iii) *The rule of analogy is inapplicable, but would in any event support the classification made by the court below.*

Classification Rule 17 (125 C. Cls. at 392, note 3) provides as follows:

CLASSIFICATION BY ANALOGY

> "When articles not specifically provided for, nor embraced in the classification as articles "noibn," are offered for transportation, carriers will apply the classification provided for articles which, in their judgment, are analogous; in such cases agents must report facts to proper officer of Freight Department in order that rating applied may be verified and necessary classification provided. This rule will not apply in connection with ratings or rates published in Exceptions to the Classification or in commodity tariffs."

[20] The foregoing examples are taken from the testimony given at Tr. 24-25 of the *Union Pacific* case by L. W. North, a member of the Official Classification Committee.

Rule 17 is a rule used only in the absence of a specific rating or an applicable noibn rating, for articles which have been overlooked in the compiling of the freight classification or are new or for one reason or another cannot be placed under any specific entry or any general noibn entry. Obviously, occasions for the use of Rule 17 are not frequent, because the purpose of the freight classification is to publish ratings on all articles and commodities offered or likely to be offered for transportation, and it is an exceptional case when no applicable rating can be found and resort must be had to Rule 17.

In 1944 and thereafter, when these shipments moved, an incendiary bomb was not a new article or one whose transportation characteristics were not known. In War Department Supply Bulletin 55-6 entitled Freight Billing Guide—Application of Consolidated Freight Classification to Chemical Warfare Service Items, incendiary bombs of the M76 and M47 types were listed with the direction that they be described on bills of lading as incendiary bombs, with reference to Item 1820 of the Consolidated Freight Tariff. See finding 13 in the *Union Pacific* case, 125 C. Cls. at 404, which was as follows:

> "13. During the time of the shipments referred to herein, the War Department had in effect a supply bulletin, No. SB 55-6, which was described as a Freight Billing Guide for the application of the Consolidated Freight Classification to Chemical Warfare Service items. The first page of the bulletin contained the following statement:
>
> This freight billing guide was compiled for the use of Transportation officers and their organizations. The bill of lading descriptions shown herein are to be used in preparing and issuing bills of lading in accordance with paragraph 14*o* (2), AR 55-150, in order to facilitate settlement of transportation charges.

> "The bulletin listed bombs of the M76 and M47 types under the heading 'Bomb, Incendiary' and included a direction that such bombs should be described on bills of lading as 'incendiary bombs' with reference to Consolidated Freight Classification No. 16, Item 1820."

A specific description and rating not only excludes the application of the general rules such as Rules 17 and 18, but also prevails over other more general descriptions which might otherwise be broad enough to cover the articles shipped. *United States* v. *Gulf Ref. Co.*, 268 U.S. 542, 546; *Atchison, T. & S. Fe Ry. Co.* v. *United States*, 74 C. Cls. 154, 156-157.

But even on the assumption, here made for the purposes of argument, that analogies were properly to be considered, the articles in question were still *incendiary bomb bodies* filled with *incendiary gels.* Such articles are far more closely analogous to the "Incendiary * * * Bombs" of Item 1820 of the freight classification than they are to gasoline noibn, or sand-filled dummy bombs, or solidified alcohol in metal cans, or dummy bombs, sand-loaded or solid.

The only difference in transportation characteristics between (a) an incendiary bomb filled with incendiary gel without bursters and fuzes and (b) an incendiary bomb filled with incendiary gel with bursters and fuzes is that the former is a somewhat less hazardous article. Other transportation characteristics such as bulk, weight, density, volume, packing, fragility, services rendered, would be the same; and of course the degree of hazard is a matter of the reasonableness of the rate and not of classification.

It is significant that Item 1820 is the only entry in the freight classification for "Incendiary * * * Bombs." If Item 1820 were not applicable to the articles in question it might be difficult to say to what it would be applicable. Item 1820 is indented under the heading

AMMUNITION, Explosive, Incendiary or Gas Smoke or Tear Producing:

There is another heading, immediately following in the freight Classification, which is:

AMMUNITION, Not Explosive, Incendiary, Gas, Smoke, or Tear Producing:

under which there are entries for bomb bodies, dummy bombs, sand loaded bombs etc.

The articles in question were not empty bomb bodies or dummy bombs or sand-loaded bombs, or cans of solidified alcohol. They were live bombs ready for use in aircraft, lacking only the bursters and fuzes which, so Finding 9 in the *Union Pacific* case (125 C. Cls. at 401; *supra*, p. 6) shows, "is a simple mechanical operation which can be done by an enlisted man in the field and consists merely of screwing in the bursting tube and snapping in the fuze."

If the rule of analogy applies at all, then, as *Erie Railroad Co.* v. *United States*, 79 C. Cls. 102, demonstates, it supports the result reached below. There the articles shipped were described as "bomb sights and bomb release mechanisms." The Government contended that they should be classified as "Ordnance stores" which were rated second class. The plaintiff claimed the rates applicable to "Scientific instruments" under Rule 17. The court held that the articles shipped were more nearly analogous to scientific instruments than to ordnance stores, and therefore that they should be classified and rated as scientific instruments as claimed by the plaintiff. The court said (79 C. Cls. at 107, 109):

"What may or may not fall within the generic designation 'scientific instruments' is manifestly a question to be determined by the instrument itself, and not by the official or departmental classification of the article

for the purposes of issue to the officers of the Army or Navy during its use. An article is not necessarily classified as ordnance stores for the purpose of ascertaining the freight charges for its transportation because the department of the Government having jurisdiction over its custody and issue for use so treats it.

* * * * * *

"The defendant likens the articles to ordnance stores; the plaintiff, to scientific instruments. We think the analogy is much nearer and more definite to scientific instruments than to ordnance stores, as to which latter term the record leaves us greatly in doubt."

Consequently, if in the present case the rule of analogy merits consideration at all, it would require the application of Item 1820 to the articles here in question as the rating which is the most nearly descriptive and applicable.

(iv) *The applicability or otherwise of the regulations for explosives and other dangerous articles has no bearing whatever on the classification of any articles for rate purposes.*

The Government argues at length (U.S. Br. 32-35) that since the articles in this case, incendiary bombs without bursters or fuzes, are not considered dangerous within the meaning of the Interstate Commerce Commission's regulations governing the transportation of explosives and other dangerous articles, it follows that they were improperly classified as incendiary bombs under Item 1820 of the Consolidated Freight Classification.

This conclusion does not follow for a number of reasons, duly set forth below, of which the controlling one is that, as this Court has held, the applicability or otherwise of the regulations as to explosives, etc., is completely irrelevant to questions of the proper rate to be charged for any of the multifarious commodities covered in those regulations.

1. The regulations in question, now contained in 49 CFR, Parts 71-78, are prescribed by the Interstate Commerce Commission pursuant to 18 U.S.C. § 835. Thereafter, as a matter of convenience to shippers and carriers these regulations are republished in the form of a tariff. See *Union Pacific* Fdg. 12, quoted *supra* pp. 6-7.

In either form, the applicability of those regulations, howsoever they may be brought to the attention of those concerned, is utterly irrelevant to any issue of freight rates or tariff classification. See *United States* v. *Gulf Ref. Co.*, 268 U.S. 542, 550, where this Court said:

> "The regulations of the Interstate Commerce Commission [for the Transportation of Explosives and Other Dangerous Articles], revised July 15, 1918, required liquid condensates from natural gas or from casinghead gas of oil wells, alone or blended with other petroleum products, having a vapor pressure of not more than ten pounds per square inch, to be shipped as 'gasoline, casinghead gasoline, or casinghead naphtha. Unrefined naphtha was not mentioned. The description of the shipments as gasoline under these regulations had no tendency to show that the tariff rate on unrefined naphtha was not applicable. The purpose of the regulations was to require a disclosure of the character of the shipment, having regard not to rates but to the dangers to be guarded against. It was not an admission on the part of the defendant that the gasoline rate was applicable or that the shipments were not unrefined naphtha within the meaning of the tariff. * * *"

In other words, the regulations as to explosives, etc., have nothing to do with rates. Here again, the Government's argument overlooks a controlling decision of this Court.

2. Even so, the Government's argument in this case badly misreads the regulation as embodied in the tariff..

The Government relies on the notation in the tariff, "subject to Rule 39"—the regulations in question—and argues (U.S. Br. 32-33) that unless the article is subject to those regulations it is not properly classified under Item 1800 or any of its subdivisions.

But "subject to Rule 39" is simply a cross-reference; it does not embody a command. And Section 342(a) of the tariff (see Fdg. 12, 125 C. Cls. at 403-404, *supra* p. 8, 49 C.F.R. [1949 ed.] § 73.342) specifically covers these articles, viz., "chemical ammunition consisting of * * * bombs * * * filled with * * * chemicals * * * without ignition elements, bursting charges, detonating fuzes, or other explosive components * * *." That provision prescribes how such articles must be packed and how they must be marked. To that extent the articles here in question *are* subject to Rule 39, by its very terms. Rule 39 is too comprehensive, covering a multitude of goods, from those that are extra-hazardous to those only slightly so, and covering a host of subjects as well, to supply a pat answer for every situation simply by mere citation. One might well seek to determine the legal questions involved in the present case by noting on the opinion under review, "subject to Title 49 U.S.C."

3. Throughout its argument, the Government urges (U.S. Br. 33-35) that the incendiary bombs less bursters and fuzes are not hazardous. This of course, is a contention going to reasonableness, an issue not open to either party in the present judicial proceeding. Even so, it may be pertinent to call attention to the rule that hazard is only one out of many factors that must be considered by the Commission in determining whether a rate or classification is just and reasonable.

In *Class Rate Investigation, 1939,* 262 I.C.C. 447, the Commission said (pp. 508-509):

> "The primary purpose of a freight classification is to assign each article, or a group of articles, to a class

according to well-known classification principles or elements which recognize distinctions from a transportation standpoint, along fairly broad lines, in order to meet the needs of commerce. None of the principles or elements should be controlling, but all that are relevant should be considered. Among them are: Weight per cubic foot and value per pound as packed for shipment; liability to loss, damage, waste, or theft in transit; likelihood of injury to other freight with which it may come in contact; risks due to hazards of carriage; kind of container or package as bearing upon the matter of liability or risk; expense of, and care in, handling; ratings on analogous articles; fair relation of ratings as between all articles; competition between articles of different description but largely used for similar purposes; commercial conditions and units of sales; trade conditions; value of service; volume of movement for the entire country in either less than carloads or carloads; adaptability to movement in carloads; and carload minimum weights just to carriers and shippers."

See also *War Materials Reparation Cases,* 294 I.C.C. 5, 144, quoted *supra,* p. 46.

Plainly enough, to concentrate entirely on the element of hazard to the exclusion of every other element—as the Government does—results in a grossly distorting oversimplification of a highly complex matter.

4. In its effort to minimize the essentially deadly character of the articles now in question, the Government makes statements that are so misleading as to be tantamount to misrepresentation. It says (U.S. Br. 34, n. 23): "Note, also, the Court of Claims' opinion holding that Napalm must be classified as 'soap powder' for freight-rate purposes. *Union Pacific Railroad Co.* v. *United States,* 117 C. Cls. 757."

The plain inference of the foregoing is that the bomb bodies here in question contained an inherently harmless and inert substance.

What the Government does not disclose, however, is that the case cited dealt, not with Napalm gel, i.e., jellied gasoline, such as is involved here, but with the Napalm itself less the gasoline, i.e., the granulated soap that is the thickening agent! And the issue before the Court of Claims in 117 C. Cls. 757 was simply whether the Napalm aluminum soap, which is not soluable in water and which is therefore wholly different from household soap and so does not qualify as "soap" in common parlance, should be classified for freight rate purposes as "soap powder" or as "chemicals noibn".

That case, accordingly, had nothing whatever to do with the inflammable Napalm gel mixture involved here, which is the vital element of the fearsome instrumentality of war that has reduced so many enemy cities to cinders.

But, by speaking of "Napalm gel" in one breath, and of "Napalm" alone in another, the Government has managed to confuse the two in a manner that, at the very least, is patently misleading.

We regret to have to point out that the same intermingling of Napalm, the thickener, and Napalm gel, the thickened gasoline, appears also at two other points in the Government's brief; we have italicized, in the passages set forth in the margin, the double meaning in which the Government has used the word "Napalm", first in one sense and then in the other.[21]

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[21] U.S. Br. 37, n. 26: " • • • the Army could have given consideration to breaking the shipments into their component parts by shipping the steel cases and *Napalm gel* separately, thus obtaining the benefit of the low fifth-class rates concededly applicable to each of the component parts. A similar shipping procedure is now utilized by the Army. The record shows that the Chemical Corps has regularly shipped '*napalm thickener* • • • separate and apart

Having exposed these misleading references to two distinct substances that are wholly different in their qualities, respondents refrain from further comment.[22]

It follows, necessarily, that the Court of Claims was correct in holding that incendiary bombs less bursters and fuzes were properly classified under Item 1820 as incendiary bombs.

V. RESPONDENTS BANGOR AND AROOSTOOK AND SEABOARD AIR LINE ARE NOT ESTOPPED SINCE THE GOVERNMENT CAN SHOW NEITHER RELIANCE, CHANGE OF POSITION, NOR PREJUDICE; AND THE UNDISPUTED FACTS WHOLLY NEGATIVE ACQUIESCENCE

The Government argues (W.S. Br. 35-41) that respondents *Bangor and Aroostook* and *Seaboard Air Line* are estopped to claim the higher rates awarded by the judgment below, relying on the following facts (U.S. Br. 8-9, 36; R. 80-82):

In November 1943, before the shipments in question were made, the Official Classification Committee, as agent of

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from the bomb body' of fire bombs (gasoline-tank type) (R. 72)." [Italics added.]

U.S. Br. 42, n. 30: "To the contrary, since a steel bomb body is rated fifth class and since *Napalm* itself, as the Court of Claims has ruled, is ratable fifth class, the Government's consistent position in all of these cases has been that the entire or combined shipment, consisting of the bomb body filled with *Napalm*, should also be rated fifth class and not first class under Item 1820. See *Union Pacific Railroad Co.* v. *United States*, 117 C. Cls. 757." [Italics added.]

[22] The Government also says (U.S. Br. 31, n. 19), "Should the cases be remanded to the Court of Claims, we are prepared to show that bomb cases with Napalm gel are not in fact ammunition." In view of the undisputed finding in the *Union Pacific* incendiary bomb case (Fdg. 14, 125 C. Cls. at 404) that "The M47 and M76 bomb bodies when filled with gels, but without the bursters and fuzes, have no purpose or use except as incendiary bombs", it is almost matter for regret that, for the reasons set forth *supra*, pp. 51-58, there will be no occasion for a remand and thus no opportunity to test the Government's attempt to demonstrate the whiteness of black.

the railroads, issued an informal ruling at the Army's request to the effect that since the incendiary bombs less bursters and fuzes "were not dangerous", they should be rated by analogy as "Empty Aerial Bombs" under item 1895. This ruling was in effect when the 1944 shipments were made, and was confirmed by the Committee in May 1945.

The Court of Claims rejected the proffered defense, saying (R. 85)—and on this point there was no dissent—

> "This ruling was subsequently rescinded and admitted to be a mistake by the Committee and also by the defendant in the *Union Pacific Railroad* case, *supra.* We do not see how the defendant could reasonably have been misled or injured by the ruling, especially when the plaintiffs promptly billed the defendant at the first-class rate and the defendant paid that rate and continued to make the shipments at the rate. Moreover, the only cases cited by the defendant on the availability of the defense of estoppel to the Government in these railroad cases are *Oregon-Washington Railroad & Navigation Company* v. *United States,* 255 U.S. 339 and *Western Pacific Railroad Company* v. *United States,* 255 U.S. 349. Both of these cases involved the acceptance by the railroad of shipments at the lower rate and gross acquiescence in the shipments at that rate. The Supreme Court held that the railroads were precluded from recovering the higher rate because of their gross acquiescence. There is no acquiescence in these cases. The railroad billed and was paid the higher rate and suit was commenced shortly after the Government set off the sums here in suit against money otherwise due the plaintiffs. See *St. Louis Brownsville & Mexico Railway Company* v. *United States,* 268 U.S. 169."

That ruling was plainly right, for a number of reasons:

1. The factual basis for the Court of Claims' determination was the testimony on file in the earlier *Union Pacific*

incendiary bomb case, 125 C. Cls. 390.[23] In that case, Mr. L. W. North, a member of the Official Classification Committee, had testified as follows (Tr. 32-33, 42; No. 49505, C. Cls.):

By Mr. Cake [Counsel for Union Pacific]:

22Q. Was your committee at one time asked for a ruling on a metal tube or container filled with gasoline and Napalm?

A. Yes, sir, we had a telephone inquiry for such a ruling.

23Q. When was that?

A. That was in 1943, I believe November.

24Q. Go ahead.

A. And a member of the Classification Committee ruled that such an article was rateable by analogy as an empty bomb.

25Q. Do you agree with that ruling?

A. No, sir, I do not.

26Q. Did that committee subsequently rescind that ruling?

A. Yes, the committee subsequently rescinded the ruling and the member of the committee that made the ruling admitted he had made a mistake and he corrected his mistake.

By Mr. Mehlinger [Counsel for the United States]:

27Q. Who was that committee member, please?

A. Mr. W. S. Flint.

By Mr. Cake:

28Q. Did the other classification committees concur in your final action?

[23] Material in a court's own files is plainly within the realm of judicial notice (e.g., *United States* v. *Pink*, 315 U.S. 203, 216; *National F. Ins. Co.* v. *Thompson*, 281 U.S. 331), and of course anything noticed below may be noticed in this Court on review. Cf. *Hanley* v. *Donoghue*, 116 U.S. 1.

A. Yes, all three classification committees considered the classification properly applicable on these bombs and concluded that they were incendiary bombs rateable under Item 1820 of the classification.

29Q. In your opinion, can these bombs filled with incendiary mixture be rated by analogy as empty aerial bombs?

A. No, sir, not in my opinion, they just can't be. If the analogy rule is to be followed at all, I would say that they are more analogous to an incendiary bomb than they are to an empty bomb, being filled with an incendiary mixture.

• • • •

By Mr. Mehlinger:

69XQ. I show you classification 16 that is involved.

A. I would be inclined to say that it is analogous to an incendiary bomb.

70XQ. Analogous to an incendiary bomb?

A. Certainly it is more analogous to that than it is to an empty bomb body.

71XQ. We are admitting on the record that we are not considering it an empty bomb. Is it your answer, then, that it would come under Rule 17 by analogy as an incendiary bomb?

A. As an incendiary bomb.

And Mr. C. G. Jensen, then Director of the Bureau of Traffic, Interstate Commerce Commission, testified (Tr. 48, same case):

By Mr. Cake:

16Q. In your opinion, could the articles in question which I have described be rated as empty aerial bombs?

Mr. Mehlinger: We stipulated that out of the case. That is not in issue, Mr. Commissioner. It is not in issue at all.

Mr. Cake: You can make a short answer.

A. No, they are filled. They are not empty.

2. But, apart from the foregoing, which showed that there was no issue of fact to be tried, it is plain that, even on the showing made in its brief, the Government cannot establish an estoppel, for the reason that it can show neither reliance, change of position, nor prejudice.

As this Court has said, "Estoppel in equity must rest on substantial grounds of prejudice or change of position * * *." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 323. Other cases are to the same effect; to constitute an estoppel, someone must have been misled (*Ketchum* v. *Dunn*, 96 U.S. 659, 667-668), there must have been reliance (*Wiser* v. *Lawler*, 189 U.S. 260, 270), there must have been a change of position (*Jones* v. *United States*, 96 U.S. 24, 29).

There was nothing of that nature here, and the Government's assertions of reliance are pointedly barren of record references,[24] for the very excellent reason that none are available. Any suggestion of reliance rests wholly on imagination; there is no showing whatever in the record that any of the shipments in question were made in reliance on the Classification Committee's ruling.[25]

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[24] U.S. Br. 9: "Relying on this ruling, issued by the railroads' own Committee, the Government contended that respondents Bangor and Seaboard were estopped from claiming that the higher rates of Item 1820 applied to the 1944 shipments." This is ambiguous, and may mean only that the Government relied on the ruling in order to contend that there was an estoppel.

At U.S. Br. 37, where the "elements of a classic estoppel" are set forth, item (3) is stated as "numerous shipments by the Army over respondents' lines during 1944, while the ruling was in full effect"—with no indication that the shipments were made in reliance on the ruling.

Item (4) is said to be "detriment to the Army, because it could have used other shipping procedures or other means of transportation had it not been led to believe that the rail shipments would move at the lower rate available under Item 1895, rather than the high first-class rate of Item 1820." No record references are given.

[25] The Government's further speculation, again totally devoid of record support, that (U.S. Br. 37, n. 26) "had the Army been

Since, therefore, a basic element of estoppel is lacking on this record, it is not necessary to inquire whether the scope of the Official Classification Committee's authority was sufficient to bind these respondents by making rulings as to rates, particularly by one which, on its face, was a palpable mistake—for by no species of analogy can a filled bomb case be said to resemble an empty one—nor to examine into the soundness or otherwise of the Government's contention (U.S. Br. 37-38) that Section 22 of the Interstate Commerce Act permits the Government to invoke the defense of estoppel though a private shipper may not.[26] It is sufficient for purposes of this case that the Government has utterly failed to show either that it relied on the ruling, or that it changed its position, or that it was in any way prejudiced thereby. That being so, there can be no estoppel on any basis.

Indeed, this record shows affirmatively that the Government paid the bills of both respondents at the higher rate, and then, some years later, made the deductions the correctness of which is now in issue (R. 43-44, Item 2; R. 56, 63, Item 2). To the extent, therefore, that there is proof of any reliance whatever on the part of the Government, its reliance was on the representation that the larger sum was due. Nor is there any showing that the Government's course of action in initially paying the bills

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so advised before 1944, it could have considered moving the Napalm-filled bomb bodies by motor carrier, rather than rail, so as to obtain a lower transportation rate," assumes that under the war conditions obtaining in 1944 there was available motor transportation of sufficient capacity to move incendiary bombs. That assumption blandly ignores both (a) the gasoline and rubber restrictions in force in 1944 and (b) the extent to which present day trucking facilities were simply not available in 1944, nor does it consider (c) whether at that time the safety regulations permitted articles of the character now in question to be shipped by truck.

[26] Compare Brandeis, J., for the Court, in *St. Louis B. & M. Ry.* v. *United States*, 268 U.S. 169, 173: "In respect to furnishing transportation, a railroad ordinarily bears to the Government the same relation that it does to a private person using its facilities."

rendered by these respondents prejudiced its present defenses in any way.

It is not at all hyperbole to say that, in the circumstances of this case, any talk of estoppel is literally preposterous.

4. Moreover, there was no acquiescence on the part of these two respondents. After they had billed the Government at the higher rates and were paid at such rates, the Comptroller General made deductions; and thereupon, within the period of limitations, each sued in the Court of Claims to recover the amount of those deductions (R. 43-44, Item 4; R. 56-63, Item 4). Bringing suit within the time allowed by law can hardly be construed as acquiescence in the Government's action. Indeed, the course of dealing could with far more justification be deemed to reflect acquiescence in fact in the higher rate on the part of the Government.

The proper explanation of the so-called estoppel cases relied on (U.S. Br. 38-40) by the Government (*Oregon-Wash. R. R. Co.* v. *United States,* 255 U.S. 339; *Western Pac. R. R. Co.* v. *United States,* 255 U.S. 349) is that they rest on acquiescence; see *St. Louis B. & M. Ry.* v. *United States,* 268 U.S. 169, where Mr. Justice Brandeis, speaking for a unanimous Court, said (268 U.S. at 174-175):

> "* * * The right to invoke the legal remedy may be lost by the claimant's failure to invoke it within the statutory period of limitations. But the substantive right to recover an amount confessedly due can be lost only through some act or omission on the part of the claimant which, under the rules of the common law as applied by this Court to claims against the Government, discharges the cause of action. Acquiescence by the claimant in the payment by the Government of a smaller amount than is due will ordinarily effect the discharge. Acquiescence can be established by showing conduct before the payment which might have led the

> Government to believe that the amount allowed was all that was claimed, or that such amount, if paid, would be received in full satisfaction of the claim. Acquiescence can also be established by showing conduct after the payment which might have led the Government to believe that the amount actually received was accepted in full satisfaction of the original claim. But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver, or from which an estoppel might arise. Every case in which this court has sustained the affirmative defense of acquiescence rests upon findings which include at least one of these additional features. * * *"

Bringing suit within the period of limitations very plainly does not amount to an abandonment of the claims without protest. The result is that these two respondents are not barred by any acquiescence on their part.

We cannot forbear to add that the defense of "estoppel" on this record is so plainly without foundation in either fact or law that it seems to us surprising that it should even have been made. Indeed, the circumstance that the Government felt impelled to rely upon such an argument simply serves to underscore the essential untenability of the balance of its case, untenability that, we submit, has been amply demonstrated throughout the present brief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be affirmed.

LAWRENCE CAKE,
1001 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for Respondents.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

RAYMOND A. NEGUS,
1001 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Of Counsel.

SEPTEMBER 1956.

APPENDIX

Statutes Involved

1. Section 16(3) of the Interstate Commerce Act (49 U.S.C. § 16) reads as follows:

"§ 16. Orders of Commission and Enforcement Thereof

* * * * *

Limitation of Actions

"(3)(a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues and not after.

"(b) All complaints against carriers subject to this chapter for the recovery of damages not based on overcharges shall be filed with the commission within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph.

"(c) For recovery of overcharges action at law shall be begun or complaint filed with the commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after, subject to subdivision (d) of this paragraph, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include six months for the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

"(d) If on or before expiration of the two-year period of limitation in subdivision (b) of this paragraph or of the two-year period of limitation in subdivision (c) of this paragraph a carrier subject to this chapter begins action under subdivision (a) of this paragraph for recovery of charges in respect of the same transportation service, or without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety

days from the time such action is begun or such charges are collected by the carrier.

"(e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

"(f) A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

"(g) The term 'overcharges' as used in this section shall be deemed to mean transportation services in excess of those applicable thereto under the tariffs lawfully on file with the commission.

"(h) The provisions of this paragraph shall extend to and embrace cases in which the cause of action accrued prior to June 7, 1924, as well as cases in which the cause of action accrues thereafter, except that actions at law begun or complaints filed with the commission against carriers subject to this chapter for the recovery of overcharges where the cause of action accrued on or after March 1, 1920, shall not be deemed to be barred under subdivision (c) of this paragraph if such actions shall have been begun or complaints filed prior to June 7, 1924, or within six months thereafter."

2. Section 322 of the Transportation Act of 1940 (49 U.S.C. § 66) reads as follows:

"§ 66. Government Traffic; Payment for Transportation; Deduction of Overpayments

Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the

amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

3. Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 1004(d), provides as follows:

"ADJUDICATION

"SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

* * * * * *

"(d) DECLARATORY ORDERS.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty."

INDEX

TABLE OF CASES:

	Page
Grand Trunk Western Railway Co. v. *United States*, 252 U. S. 112	4, 5
McGrath v. *Kristensen*, 340 U. S. 162	2
Midstate Co. v. *Penna. R. Co.*, 320 U. S. 356	7
Morrisdale Coal Co. v. *Pennsylvania R. R. Co.*, 230 U. S. 304	3, 7
Union Pacific Railroad v. *United States*, 125 C. Cls. 390	8, 9, 10, 11
United States v. *Kansas City Southern Railway Co.*, 217 F. 2d 763	7
War Materials Reparation Cases, 294 I. C. C. 5	12
Miscellaneous:	
Webster's New Collegiate Dictionary, 1956, pp. 558–559	12
Statutes:	
Act of February 28, 1920, 41 Stat. 49	7
Act of June 7, 1924, 43 Stat. 633	7
Act of September 18, 1940, sec. 322, 54 Stat. 913 (49 U. S. C. 66)	4, 7
Interstate Commerce Act (24 Stat. 379, 49 U. S. C. 1, *et seq.*, sec. 16 (3)	5, 6, 7

404255—56

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 18

UNITED STATES, PETITIONER

v.

THE WESTERN PACIFIC RAILROAD COMPANY, BANGOR AND AROOSTOOK RAILROAD COMPANY, AND SEABOARD AIR LINE RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents' brief argues that the Government seeks to inject "into the case, in violation of the Rules and practice of this Court, * * * questions not put forward in its petition for certiorari" (Resp. Br., pp. 18, 34–37). We carefully explained in our opening brief (pp. 12–14), as we did earlier in our petition (p. 8), that the Court of Claims, in taking jurisdiction of these carrier suits, necessarily assumed that the statute of limitations incorporated in Section 16 (3) does not apply to carrier suits against the United States, though it has held, at the same time, that the same limitations circumscribe the defenses

which are available to the Government. See, also, the Government's Question 1, as it appears both in the petition (p. 2) and the opening brief (p. 2). The burden of our argument has been (and is) that, on the Court of Claims' assumption that the carrier is not barred from suit, its decision is nonetheless plainly wrong. Respondents take us to task for stating that this Court may also see fit to examine the validity of the underlying assumption. In our view, this vehement complaint challenges an old and familiar doctrine, confirmed as recently as the decision in *McGrath* v. *Kristensen,* 340 U. S. 162, 167–168: That a party, at any stage, may properly call attention to a jurisdictional question, and that this Court may always examine such a question if it sees fit.[1]

2. Respondents advance three theories in justifying the refusal of the court below to refer the "reasonableness" question to the Interstate Commerce Commission: (*a*) The Government "had ample opportunity" to raise the question by instituting proceedings before the Interstate Commerce Commission within the two-year period prescribed by Section 16

[1] The petition also raised the question whether the Court of Claims correctly decided the classification issue in the case (question 2). We argued that it had not because uncontroverted affidavits required a conclusion contrary to that reached. We have also argued that the Court may find it unnecessary to decide that issue because it may conclude that, at the least, the court below should have fully tried the issue, instead of deciding it against the Government on summary judgment. The latter argument is certainly fairly comprised by the question. Far from broadening the question and increasing the burden on this Court (see Resp. Br., pp. 47–48), it narrows and limits.

(3) but failed to do so (Resp. Br., pp. 13, 22); (*b*) the two-year limitation period limits the Commission's power so that the Commission would have no jurisdiction thereafter to entertain the "reasonableness" question on a referral; (*c*) *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304—a case not relied on by the Court of Claims and cited in respondents' brief here for the first time—"is controlling" and "requires affirmance" of the judgment below (Resp. Br., p. 32).

We deal *seriatim* with these arguments.

(*a*) The Government's so-called "ample opportunity" to raise the "reasonableness question" before the Commission within two years is completely illusory. The shipments in the *Western Pacific* case, for example, took place in 1948 and 1950. The carrier at that time received payments from the Government computed on the basis of the lower fifth-class rate (U. S. Br., p. 7, n. 3; Resp. Br., p. 3). It was not until the carrier filed suit in the Court of Claims in 1954, exactly six years after the first shipment and four years after the last shipment, that the carrier claimed underpayment, challenged the application of the fifth-class rate, and asserted it was entitled to the higher, first-class rate (R. 1, 3). It follows that there was no need and, indeed, no warrant for the Government to proceed before the Commission within two years after the 1948 and 1950 shipments.

Similar considerations apply to the *Bangor and Aroostock* and *Seaboard* shipments in 1944. These two shipments were originally paid for at the higher, first-class rate (U. S. Br., p. 7, n. 3). On post-audit

by the General Accounting Office, the charges were recomputed at the lower, fifth-class rate, and, as explicitly authorized by Section 322 of the Transportation Act of 1940, 49 U. S. C. 66, the overpayments were deducted from the amounts due the carriers on later transportation services. Section 322, while directing payment of carriers' transportation bills on presentation and before audit, protects the Government by expressly reserving to the Government this right to deduct overpayments from later bills. See U. S. Br., pp. 4, 40. The existence of this right requires outright rejection of respondents' claim that the Government can protect itself against overcharges only by instituting Commssion proceedings within two years after shipment (U. S. Br., pp. 19–20). Section 322, of course, imposes no such restrictive limitation on the Government. And even apart from Section 322, it is a settled principle that the Government, in recouping overpayments through deductions, is not required first to establish the "illegality" of the overpayment or the legality of the deduction. *Grand Trunk Western Railway Co.* v. *United States,* 252 U. S. 112, 120.[2] Respondents' theory, if accepted,

[2] The *Grand Trunk Western Railway* case also originated as an action by the carrier in the Court of Claims to recover deductions made by the Government in 1912 for overpayments to the carrier during the prior twelve-year period. 252 U. S. 112, 117. In writing for a unanimous Court, Justice Brandeis rejected the contention that the validity of the deduction should have been established before it was made and stated flatly that the Government "was under no obligation to establish the illegality [of the prior overpayments] by suit" and that, "It matters not how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to

would nullify this principle and, at the same time, strip the Government of the full, post-audit protection Congress intended to accord it in Section 322.

(*b*) Respondents argue that Section 16 (3)'s two-year limitation period limits the power of the Commission and that it would therefore have been a vain act to refer the question of "reasonableness" to that agency. But we are not concerned here with the original jurisdiction of the Commission. The courts are obliged to refer to the Commission questions arising in a judicial proceeding which are appropriate for the agency's determination. U. S. Br., p. 16, *et seq.* Section 16 (3) creates no obstacle to this procedure, for its language applies only to actions instituted before the Commission. It does not impinge upon the power of referral as an incident of a judicial proceeding. In all of the cases cited by respondents Section 16 (3)'s limitation period was invoked to bar an *affirmative* claim advanced by the *plaintiffs* in those cases. Those cases are not apposite. Here, the plaintiff seeks to invoke the statute of limitations as a means of preventing the defendant from establishing a defense before the Interstate Commerce Commission, concededly the only body authorized to pass upon the correctness of the defense. This distinction is of crucial significance because, if the court below was right, the two-year limitation period constitutes no bar to the carriers' suits against the

recover it was deferred. The statute of limitations does not ordinarily run against the United States and would not present a bar to a suit for the amount." 252 U. S. 112, 121.

United States but nevertheless bars the United States from obtaining consideration before the Interstate Commerce Commission of its major defense to such suits. In short, the carrier would be allowed to collect charges which are unreasonable simply by waiting for two years to elapse before filing suit against the United States in the Court of Claims.

Furthermore, respondents' argument that referral was improper because the Commission lacked power upon expiration of the two-year period is predicated on the assumption that a limitations defense of this sort may be applied to the United States. But, as we have shown in our main brief, the United States is not subject to the limitation provisions of Section 16 (3) (U. S. Br., pp. 25–27).

Respondents do concede that this two-year limitation period cannot be invoked against the United States "if it goes to court" (Resp. Br., p. 19). Respondents further recognize that this concession necessarily "follows from the general proposition that the United States, as sovereign, is not bound by statutes of limitations, * * * except of course where it is specifically named in the statute" (Resp. Br., pp. 19–20).[3] It also follows from the same general propo-

[3] Respondents' brief advances this same "sovereign's traditional immunity from" limitations as the sole explanation for the Court of Claims' holdings immunizing the carriers from Section 16 (3)'s statute of limitations. At pages 33–34 of their brief, respondents set forth the general reasoning that the United States, because of the *sovereign's* traditional immunity, is not subject to limitations. The brief then boldly asserts, at page 34, that "by parity of reasoning" the Court of Claims has refused to apply to the *carriers* Section 16 (3)'s two-year limitation period!

sition, we submit, that Section 16 (3) cannot be invoked against the Government with respect to Commission proceedings. Section 16 (3) is inapplicable to the Government whether it is before the Commission or a court. In both instances congressional failure to refer explicitly to the United States in Section 16 (3) precludes application of that Section's period of limitations.

(*c*) The *Morrisdale Coal Co.* case, not previously cited by respondents, is now advanced as "controlling". At the outset, we would point out that respondents' brief incorrectly states that the "Eighth Circuit's decisions relied on by the Government ignore" the *Morrisdale* case (Resp. Br., p. 33). Our main brief relies on and quotes from the Eighth Circuit's opinion denying a petition for rehearing in *United States* v. *Kansas City Southern Railway Co.*, 217 F. 2d 763, 769–770 (U. S. Br., pp. 21–22). In the same opinion, at page 775, the Court of Appeals fully explains and discusses the *Morrisdale* case and shows that it is in nowise inconsistent.

Morrisdale, decided in 1913, dealt with a statute of limitations provision in Section 16, which has since undergone considerable revision. See Act of February 28, 1920, 41 Stat. 491; Act of June 7, 1924, 43 Stat. 633; Act of September 18, 1940, 54 Stat. 913. Section 16, as it stands today, bears little resemblance to the Section 16 involved in *Morrisdale*. *Midstate Co.* v. *Penna. R. Co.,* 320 U. S. 356, 362, Note 15.

Equally important is the fact that in *Morrisdale* the statute of limitations was invoked against the plaintiff in order to bar an affirmative claim. Here, as already noted, respondents seek to invoke the limita-

tion as a bar to the consideration of a defense. See page 5. Furthermore, here, unlike *Morrisdale*, there was, as we have shown, no need or warrant for the Government to file an anticipatory claim with the Commission. See pages 3–5. Finally, *Morrisdale* in no way dealt with the special immunity of the Government as a shipper or carrier from federal statutes of limitation defenses. For all of these reasons, we believe it plain that *Morrisdale* is not only not controlling but not even in point.

3. In justifying the Court of Claims' holding that the shipments involved were "incendiary bombs", respondents (*a*) rely primarily on the findings and decision of the Court of Claims in an earlier case, *Union Pacific Railroad* v. *United States,* 125 C. Cls. 390, and (*b*) argue that the shipments were subject to the Interstate Commerce Commission's Regulations on "Explosives and Other Dangerous Articles" and for that reason subject to the high, first-class rates of Item 1820 (Resp. Br., pp. 4–10, 51–58, 72).

(*a*) Obviously, the Court of Claims' opinion in *Union Pacific Railroad* v. *United States,* 125 C. Cls. 390, does not justify deprivation of the Government's right to its day in court and to a trial on the merits of the instant cases, in which an entirely different record was developed (R. 86).

In the *Union Pacific* case, the record was complicated by the fact that 500-pound PT1-gel-filled bomb cases were involved in addition to the napalm-gel-filled hundred-pounders (Resp. Br., p. 4). In the instant cases, there is no doubt that only napalm-gel-filled bodies are involved.

Of much greater importance, however, is the fact that the Government in the *Union Pacific* case incorrectly stipulated that the bomb cases were filled with an "incendiary mixture." The carrier's counsel in that case built his entire case on this stipulated "fact". His opening statement emphasized that it had been "stipulated" that "the articles in question are steel bomb bodies filled with incendiary mixtures" (Transcript of Testimony, *Union Pacific Railroad Company* v. *United States* (125 C. Cls. 390), No. 49505, at p. 1). His questions to witnesses constantly referred to bombs filled with "incendiary mixtures" (*Id.* at pp. 15, 16, 17, 19). His questions always assumed that the only "dispute in this case" is the "rating" of bombs filled with "incendiary mixtures" (*Id.* at p. 25). The questions would accordingly begin with the assertion: "The question about to be put to you is based on the stipulated facts which you may assume to be established as follows: The articles offered for shipment are steel bomb bodies filled with an incendiary mixture" (*Id.* at pp. 26–27, 45). The answers elicited from plaintiff's witnesses thus presupposed that the mixture was an incendiary one (*Id.*, pp. 33, 45). Again, at another point in the trial of the *Union Pacific* case, carrier's counsel stressed the concession in "the stipulation of facts that these were bomb bodies filled with incendiary mixture, so there is no use talking about something that is not incendiary" (*Id.* at p. 41).

Thus, the incorrect stipulation, around which the carrier's case and evidence were built, permeated the entire trial of the *Union Pacific* case. It is true that

the Government, at the close of that trial, realized that the stipulation was incorrect, and that the mixture was not in fact incendiary. At that point, steps were taken to correct the stipulation. But the harm caused by the error had already been done. The carrier's evidence, based on the incorrect stipulation, was already in the record and was not stricken. And the Court of Claims' opinion in that case refers in at least two places to steel bomb bodies "filled with an incendiary gel" or "an incendiary mixture," showing the heavy reliance the court itself placed on the stipulation and on the evidence which carrier's counsel was able to adduce on the basis of the stipulation. 125 C. Cls. 390, 392, 393; see Resp. Br., p. 9.

There is, of course, no such stipulation or concession in the cases now here. To the contrary, as the uncontroverted affidavits in the record show, all of the evidence in the cases now here is to the effect that napalm gel is *not* incendiary (U. S. Br., pp. 28–30; R. 8, 10, 12, 13, 75–77, 79).

There is still a third important distinction between the *Union Pacific* case and the ones now here. The former case placed considerable weight on the reference to "incendiary" in War Department Billing Guides, Field Manuals, and Technical Manuals. Resp. Br., pp. 8, 9, 67. In the instant cases, the record establishes that the Army's description was not accurate and that all the description intended to convey was that the steel bomb body and the napalm gel filler—neither of which is incendiary—were component parts to be used in assembling a complete incendiary bomb. Thus, the affidavits in the record

of Mr. Fay and of Drs. Finkelstein and Magram all point out that the description in the Army manuals "denotes the eventual use to which the completed bomb will be put and is not descriptive of a steel bomb body filled with Napalm Gels alone" (R. 8–9, 10, 13). And, as the record shows, the term "incendiary", as used by the Army, merely identifies "tactical use of the completed bomb" (R. 11). Moreover, the record here further shows that, prior to the shipments involved in the cases now here, the Army Freight Billing Guide (Resp. Br. 8–9) was revised in view of the fact that a napalm-filled bomb body "shipped, without burster and fuze, was neither incendiary nor explosive" (R. 14).

The present cases, therefore, are entirely different from *Union Pacific,* and respondents' attempt to rely on the decision rendered on the record as developed in the latter case is plainly unwarranted.

(*b*) Our main brief points out that a shipment does not come under the high, first-class rates of Item 1820 unless it is subject to the Commission's Regulations on "Explosives and Other Dangerous Articles" (U. S. Br., pp. 32–35). Respondents suggest that this requirement is met because steel bomb bodies filled with napalm gel must be deemed to be "chemical ammunition", and as such are covered by the Regulations. But the record refutes the suggestion. It shows that the shipments may *not* be considered "chemical ammunition". The Bureau of Explosives, which enforces the Regulations, has expressly stated that napalm-gel-filled bomb bodies do not fall within the Regulations because they are not "explosive chemical ammunition" and also do not contain any "of the

chemicals or liquids referred to in Sections 330, 342, and 364 [of the Regulations], relating to chemical ammunition" (R. 21, 19; see Resp. Br., pp. 7–8, 72).[4]

[4] Similarly misplaced is respondents' reliance on the *War Materials Reparation Cases*, 294 I. C. C. 5 (Resp. Br., pp. 45–46). Those cases involved the question of reasonableness of application of the high first-class rates to several articles which, unlike the shipments in the present case, were in fact "explosive" or otherwise "dangerous" ammunition and hence covered by the Commission's Regulations.

One final point deserves mention; respondents attack the Government for "misleading references" to "napalm gel" as "napalm" and for failure to distinguish precisely between these "two distinct substances." Resp. Br., pp. 74–75. We are convinced that our main brief adequately distinguishes the two and shows that napalm gel is simply gasoline which has been thickened or gelatinized by the addition of a soap powder known as "napalm" (Br., pp. 5, 28–35). It is interesting to note in this connection that *Webster's New Collegiate Dictionary* for 1956 defines "napalm" not only as "a thickener" but as "also the gelled fuel made with it" (pp. 558–559). Of even greater interest—in light of respondents' attack—is the fact that respondents themselves in at least *90* places in the record and in their brief in opposition have referred to "Napalm gel" as either merely "Napalm" or "NP". Resp. Br. in Opp., p. 3; R. 2A, 25, 29, 33, 34, 38, 40, 52, 57, 58, 59–61, 70.

In any event, what is of importance is the fact that the thickening of the gasoline by the addition of the napalm retards the gasoline's free-flowing qualities and makes the shipment considerably less hazardous from a transportation viewpoint "than a drum filled with gasoline because Napalm Gel will not and cannot leak from its container because it is a solid substance. Neither will Napalm Gel burn as readily as gasoline" (R. 9, 77). What is equally important is the fact that gasoline concededly is rated at fifth class, that the napalm thickener concededly is rated at fifth class, and that a steel bomb body concededly is rated at fifth class. The Government's basic position in these cases has been that the entire shipment, consisting of the bomb body filled with napalm gel—or with gasoline which has been gelatinized by the addition of napalm—should also be rated fifth class and not, as the court below held, first class under Item 1820.

CONCLUSION

For the reasons stated in this brief and in our main brief, we respectfully submit that the judgment below should be reversed and the cause remanded with directions which will permit a full presentation of the petitioner's defenses.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
RALPH S. SPRITZER,
Assistant to the Solicitor General.
MELVIN RICHTER,
MORTON HOLLANDER,
Attorneys.

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SUPREME COURT OF THE UNITED STATES

No. 18.—October Term, 1956.

The United States, Petitioner, v. The Western Pacific Railroad Company et al.	On Writ of Certiorari to the United States Court of Claims.

[December 3, 1956.]

Mr. Justice Harlan delivered the opinion of the Court.

The three respondent railroads each sued in the Court of Claims to recover from the United States as shipper the difference between the tariff rates actually paid and those allegedly due on 211 Army shipments of steel aerial bomb cases filled with napalm gel.[1] Approximately 200 of the shipments were made over the lines of respondents Bangor and Seaboard in 1944; the remainder were carried by respondent Western Pacific in 1948 and 1950.

Napalm gel is gasoline which has been thickened by the addition of aluminum soap powder. The mixture is inflammable but not self-igniting. In a completed incendiary bomb the napalm gel is ignited by white phosphorus contained in a burster charge, which in turn is fired by a fuse. These shipments, however, involved only the steel casings and the napalm gel; burster and fuse had not yet been added.

The carriers billed the Government at the high first-class rates established in Item 1820 of Consolidated Freight Classification No. 17 for "incendiary bombs." Pursuant to § 322 of the Transportation Act of 1940,[2] the

[1] The suits were brought under the Tucker Act, 28 U. S. C. § 1491.

[2] 54 Stat. 955, 49 U. S. C. § 66. This section provides: "Payment for transportation of the United States mail and of persons or prop-

Government paid the bills of the Bangor and the Seaboard as presented; on post-audit, however, the General Accounting Office made deductions against these respondents' subsequent bills on other shipments, on the ground that the shipments in question should have been carried at the lower, fifth-class, rate applicable to gasoline in steel drums.[3] The bills of the Western Pacific were initially paid at the lower rate. Respondents thereupon brought the present suits to recover the difference between the bills as rendered and as paid in the case of the Western Pacific, and the amount of the deductions in the other two cases.

The Government defended on three grounds: (1) that Item 1820 was inapplicable because absence of burster and fuse deprived these bombs of the essential characteristics of "incendiary bombs," and hence no additional sums were due; (2) that if this tariff item was held to govern, the tariff would be unreasonable as applied to these shipments, and that as to this issue the court pro-

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erty for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier."

[3] It is not entirely clear from the record just what rate the Government believes is applicable to these shipments. It seems to concede that Item 1895 of Consolidated Freight Classification No. 17, covering "Empty Aerial Bombs," does not apply, although this was the original classification assigned to such shipments by the Official Classification Committee, a railroad tariff agency. The essence of the Government's position seems to be that these shipments, being nonincendiary, were a mere combination of gasoline, napalm thickener, and steel casings. Since these three items, standing alone, are all carried at the fifth-class rate, the Government urges that the "combination rule" should apply and the articles be carried at the same fifth-class rate under Rule 18 of Consolidated Freight Classification No. 17.

ceedings should be suspended and the matter referred to the Interstate Commerce Commission; and (3) that in any event the Bangor and Seaboard were estopped from charging the "1820" rate.

The Court of Claims, relying on its earlier decision in *Union Pacific R. Co.* v. *United States*, 125 Ct. Cl. 390,[4] entered summary judgment for respondents, two judges dissenting.[5] It held that the shipments in question were "incendiary bombs" within the meaning of Item 1820 of the tariff and thus entitled to the higher rate. In addition, while seemingly recognizing the Government's right to have the defense of unreasonableness determined by the Interstate Commerce Commission, the court ruled that the running of the two-year period of limitations provided by § 16 (3) of the Interstate Commerce Act[6] cut off the right of referral to the Commission. Lastly, the court overruled the defense of estoppel as to the respondents Bangor and Seaboard. Because of the importance of these questions in the administration of the Interstate Commerce Act, and alleged conflict among the lower courts on the issue of limitations, we granted certiorari. 350 U. S. 953.

I.

We are met at the outset with the question of whether the Court of Claims properly applied the doctrine of primary jurisdiction in this case, that is whether it correctly allocated the issues in the suit between the jurisdiction of the Interstate Commerce Commission and that of the court. In the view of the court below, the case presented

[4] In that case the Court of Claims held Item 1820 applicable to shipments similar to those involved here. The Government did not seek review of that decision.

[5] 132 Ct. Cl. 115, 131 F. Supp. 919. The dissenters were Judge Madden and Judge Jones.

[6] 24 Stat. 384, as amended, 49 U. S. C. § 16 (3).

two entirely separate questions. One was the question of the construction of the tariff—whether Item 1820 was applicable to these shipments. The second was the question of the reasonableness of that tariff, if so applied. The Court of Claims assumed, as it had in the *Union Pacific* case, *supra*, that the first of these—whether the "1820" rate applied—was a matter simply of tariff construction and thus properly within the initial cognizance of the court.[7] The second—the reasonableness of the tariff as applied to these shipments—it seemed to regard as being within the initial competence of the Interstate Commerce Commission. Before this Court neither side has questioned the validity of the lower court's views in these respects. Nevertheless, because we regard the maintenance of a proper relationship between the courts and the Commission in matters affecting transportation policy to be of continuing public concern, we have been constrained to inquire into this aspect of the decision. We have concluded that in the circumstances here presented the question of tariff construction, as well as that of the reasonableness of the tariff as applied, was within the exclusive primary jurisdiction of the Interstate Commerce Commission.

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary

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[7] The Court of Claims stated in the *Union Pacific* case, 125 Ct. Cl., at 393: "At the outset, it should be noted that while this court has no rate-making functions . . . the construction and application of published rates and classifications are proper matters for the courts as well as for the Interstate Commerce Commission."

jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, 433.

No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference* v. *United States*, 342 U. S. 570. The two factors are part of the same principle,

> "now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by prelimi-

> nary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." *Id.*, at 574–575.

The doctrine of primary jurisdiction thus does "more than prescribe the mere procedural time-table of a lawsuit. It is a doctrine allocating the law-making power over certain aspects" of commercial relations. "It transfers from court to agency the power to determine" some of the incidents of such relations.[8]

Thus the first question presented is whether effectuation of the statutory purposes of the Interstate Commerce Act requires that the Interstate Commerce Commission should first pass on the construction of the tariff in dispute here; this, in turn, depends on whether the question raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act. Decision is governed by two earlier cases in this Court. In *Texas & Pacific R. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138, a shipper attempted to ship oak railroad ties under a tariff for "lumber." The carrier rejected them, urging that such ties were not lumber. In a damage action expert testimony was received on the question. This Court, however, held that the Interstate Commerce Commission alone could resolve the question. The effect of the holding is clear: the courts must not only refrain from making tariffs, but, under certain circumstances, must decline to construe them as well. A particularization of such circumstances emerged in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. There the Court held that where the

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[8] Jaffe, Primary Jurisdiction Reconsidered, 102 Univ. Pa. L. Rev. 577, 583–584 (1954).

question is simply one of construction the courts may pass on it as an issue "solely of law." But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that "the enquiry is essentially one of fact and of discretion in technical matters," then the issue of tariff-application must first go to the Commission. The reason is plainly set forth: such a "determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." *Id.*, at 291. We must therefore decide whether a determination of the meaning of the term "incendiary bomb" in Item 1820 involves factors "the adequate appreciation of which presupposes an acquaintance with many intricate aspects of transportation." We conclude that it does.

A tariff is not an abstraction. It embodies an analysis of the costs incurred in the transportation of a certain article and a decision as to how much should, therefore, be charged for the carriage of that article in order to produce a fair and reasonable return. Complex and technical cost-allocation and accounting problems must be solved in setting the tariff initially. In the case of "incendiary bombs," since it is expensive to take the elaborate safety precautions necessary to carry such items in safety, evidently there must have been calculation of the costs of handling, supervising and insuring an inherently dangerous cargo. In other words, there were obviously commercial *reasons* why a higher tariff was set for incendiary bombs than for, say, lumber. It therefore follows that the decision whether a certain item was intended to be covered by the tariff for incendiary bombs involves an intimate knowledge of these very reasons themselves. Whether steel casings filled with napalm

gel are incendiary bombs is, in this context, more than simply a question of reading the tariff language or applying abstract "rules" of construction. For the basic issue is how far the reasons justifying a high rate for the carriage of extra-hazardous objects were applicable to the instant shipment. Do the factors which make for high costs and therefore high rates on incendiary bombs also call for a high rate on steel casings filled with napalm gel? To answer that question there must be close familiarity with these factors. Such familiarity is possessed not by the courts but by the agency which had the exclusive power to make the rate in the first instance. And, on the other hand, to decide the question of the scope of this tariff without consideration of the factors and purposes underlying the terminology employed would make the process of adjudication little more than an exercise in semantics.

The main thrust of the Government's argument on the construction question went to the fact that the shipments here involved were not as hazardous as contemplated by the term "incendiary bomb" as used in the tariff, and that therefore the tariff should not be construed to cover them.[9] Similarly, the dissenting judges below emphasized the absence from the shipments of the commercial factors which call for a high rate on incendiary bombs: "If the reason for the high freight rate is the incendiary quality of the freight, and if the freight does not have the incendiary quality, the reason for the high rate vanishes and the rate should vanish with it." 132 Ct. Cl., at 118. The difficulty with this line of argument is that we do not know whether the "incendiary

[9] In response to the motion for summary judgment the Government presented affidavits by chemical engineers stating that napalm gel is not incendiary. But these affidavits become meaningful only if the court knows the precise relevance of the incendiary quality of the shipments to the setting of the rate.

quality of the freight" was in fact the reason for the high rate, still less whether that was the only reason and how much weight should be assigned to it. Courts which do not make rates cannot know with exactitude the factors which go into the rate-making process. And for the court here to undertake to fix the limits of the tariff's application without knowledge of such factors, and the extent to which they are present or absent in the particular case, is tantamount to engaging in judicial guesswork. It was the Commission and not the court which originally determined why incendiaries should be transported at a high rate. It is thus the Commission which should determine whether shipments of napalm gel bombs, minus bursters and fuses, meets those requirements; that is, whether the factors making for certain costs and thus a certain rate on incendiaries are present in the carriage of such incompleted bombs.

This conclusion is fortified by the artificiality of the distinction between the issues of tariff construction and of the reasonableness of the tariff as applied, the latter being recognized by all to be one for the Interstate Commerce Commission. For the Government's thesis on the issue of reasonableness is not that the rate on incendiary bombs is, in general, too high. It argues only that the rate "as applied" to these particular shipments is too high—*i. e.*, that since the expenses which have to be met in shipping incendiaries have not been incurred in this case, the carriers will be making an unreasonable profit on these shipments. This seems to us to be but another way of saying that the wrong tariff was applied. In both instances the issue is whether the factors which call for a high rate on incendiary bomb shipments are present in a shipment of bomb casings full of napalm gel but lacking bursters and fuses. And the mere fact that the issue is phrased in one instance as a matter of tariff construction and in the other as a matter of reasonableness should not

be determinative on the jurisdictional issue. To hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into operation at the whim of the pleader.[10]

By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in *Great Northern R. Co.* v. *Merchants Elevator Co., supra,* which call for decision based on the particular facts of each case. Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the factors underlying it. See *Crancer* v. *Lowden,* 315 U. S. 631. And in many instances construing the tariff does not call for examination of the underlying cost-allocation which went into the making of the tariff in the first instance. We say merely that where, as here, the problem of cost-allocation is relevant, and where therefore the questions of construction and reasonableness are so intertwined that the same factors are determinative on both issues, then it is the Commission which must first pass on them.

[10] The artificiality of trying to separate the issue of "construction" from that of "reasonableness as applied" is illustrated by the Court of Claims' holding in the *Union Pacific* case, *supra.* There, after holding that the absence of bursters and fuses did "not affect the identity of the articles" as incendiary bombs, the court went on to say that "it may well be that a lower tariff rate should apply to the carriage of the less hazardous incendiary bomb [one without burster and fuse]. This question is not within our jurisdiction, however, as the question of the reasonableness of rates is a matter entrusted by Congress solely to the Interstate Commerce Commission." 125 Ct. Cl., at 393, 394. Similarly, the Government here concedes that the question of hazard "goes to the issue of reasonableness," although arguing that it is "also relevant to the question of tariff interpretation, for, like any other instrument, a tariff is to be read in the light of its known purposes and in a manner which avoids unnecessary and gross unfairness."

We hold, therefore, that both the issues of tariff construction and the reasonableness of the tariff as applied were initially matters for the Commission's determination.

II.

We come then to the question of whether referral of these issues to the Commission was barred by the two-year period of limitation contained in § 16 (3) of the Interstate Commerce Act. We hold that it was not.

Section 16 (3)(a) provides that "all actions at law by carriers subject to this chapter for recovery of their charges . . . shall be begun within two years from the time the cause of action accrues, and not after." [11] This provision makes it clear that where a carrier sues a private shipper the action must be brought within two years. However, the Court of Claims Act, 28 U. S. C. § 2501, provides that "every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed . . . within six years after such claim first accrues." Relying on the broad language of the latter act, the Court of Claims has, since 1926, consistently held that § 16 (3) does not apply to suits by carriers to recover alleged undercharges from the United States as shipper. *Southern Pac. Co.* v. *United States*, 62 Ct. Cl. 391; *Seaboard Airline R. Co.* v. *United States*, 113 Ct. Cl. 437; *Union Pacific R. Co.* v. *United States*, 114 Ct. Cl. 714. The present suits were thus held timely brought,[12] even

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[11] 24 Stat. 384, as amended, 49 U. S. C. § 16 (3)(a).

[12] The suits were instituted in 1954. In the *Western Pacific* case the carrier's claims accrued in 1948 and 1950, when the United States paid the lower rate instead of the "1820" rate for which it was billed. As to the *Bangor* and *Seaboard* cases, where the United States initially paid the "1820" rate as billed (presumably in 1944 when the shipments were made), and subsequently readjusted that rate on post-audit, it is impossible to say when the claims accrued as the record is silent as to when the post-audit readjustment was made.

though more than two years had elapsed since the accrual of the cause of action.[13] However, the Court of Claims held that the two-year limitation of § 16 (3) did bar the Government from obtaining a reference of its defense of unreasonableness to the Interstate Commerce Commission.[14] Presumably it would have ruled likewise as to the issue of tariff construction had it regarded that question as lying initially within the competence of the Commission. In other words, the holding below was that the United States can be sued for six years but can raise certain defenses only if the suit is brought in the first two of those years.

We may assume, without deciding, that the Government would have been barred by § 16 (3) from filing an affirmative suit before the Commission to recover overcharges from a carrier. Nevertheless we do not think that the statute operates to bar reference to the Commission of questions raised by way of defense in suits which are themselves timely brought. Respondents in effect ask us to hold that a suit may be brought for six years but that certain defenses thereto may be raised only for two years. Only the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit.

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[13] Although questioning the soundness of this ruling which subjects carriers' claims against the United States as shipper to a more lenient statute of limitations than that applicable to their claims against other shippers, the Government has not challenged it here. We therefore do not pass on it.

[14] The opinion of the Court of Claims does not expressly refer to the two-year period of § 16 (3). The cases cited by the court, however, make it clear that it had in mind that provision, probably § 16 (3) (c), which reads: "For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers subject to this chapter within two years from the time the cause of action accrues, and not after . . . ."

Section 16 (3) does not deal with referral of questions to the Commission incident to judicial proceedings. On its face it has to do only with the commencement of actions or reparation proceedings before the Commission. There is therefore no language which militates against the conclusion that the statute does not apply to referrals. More important, the basic policy behind statutes of limitations has no relevance to the situation here. The purpose of such statutes is to keep stale litigation out of the courts. They are aimed at lawsuits, not at the consideration of particular issues in lawsuits. Here the action was already in court and held to have been brought in time. To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale.

It is argued that this Court has construed § 16 (3) as "jurisdictional" and that the Commission is therefore barred absolutely from hearing questions as to the reasonableness of rates arising in suits brought after two years, whether such questions come to the Commission by way of referral or in an original suit. Reliance is placed upon *Phillips* v. *Grand Trunk R. Co.*, 236 U. S. 662; *William Danzer Co.* v. *Gulf R. Co.*, 268 U. S. 633; *Midstate Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356. But these cases all dealt with affirmative claims for the recovery of transportation charges, and not with referrals incident to suits which were originally brought in time. The teaching of the *Midstate* case, for instance, is that the running of the statute destroys the *right* to affirmative recovery as well as the remedy, so that the period of limitations cannot be waived by the parties. But here the Government is not

asserting a right to affirmative recovery. It is seeking only to have adjudicated questions raised by way of defense. It is therefore irrelevant whether the statute of limitations is "jurisdictional" or not; the question would still remain whether Congress intended it to apply to referrals as well as to affirmative suits. Nor does *Morrisdale Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 304, help the respondents. There again the statute of limitations was invoked against a plaintiff in order to bar an affirmative claim which was untimely filed. A coal shipper had sued a carrier for damages arising out of the alleged discriminatory allotment of railroad cars for its use. Stating that the propriety of the carrier's method of allotment, even though incident to a damage action, was cognizable only by the Commission, and that redress there was governed by the two-year statute of limitations, the Court held that the statute could not be evaded by filing suit in the District Court, rather than before the Commission, and then having the barred claim adjudicated by referral to the latter. In effect the holding was that the plaintiff had invoked the wrong tribunal, and that since limitations barred suit before the correct tribunal no referral could be made to the latter. *Morrisdale* must be limited to its peculiar facts, and we shall not extend it to bar the referral of defenses in actions properly and timely brought, as the Court of Claims has held this one was.[15]

We are told that the Government can protect itself, when it believes it has been charged an unreasonable rate,

[15] The fact that in this instance the issues of tariff "construction" and "reasonableness" were both referrable to the Commission does not, of course, bring the case within *Morrisdale*. Both of these questions were issues only by reason of the Government's defense; neither was part of the carrier's affirmative case. In other words, had the applicability of this tariff not been challenged by the Government, the carrier's own case would have presented nothing which was referrable to the Commission.

by filing an affirmative claim for reparations with the Commission within the two-year period provided by § 16 (3). But Congress has relieved the Government from filing such anticipatory suits by expressly authorizing the General Accounting Office to deduct overpayments from subsequent bills of the carrier if, on post-audit, it finds that the United States has been overcharged.[16] This right was thought to be a necessary measure to protect the Government, since carriers' bills must be paid on presentation and before audit. On respondents' theory the Government could invoke this right only at the peril of losing its defenses in a later suit by the carrier. Evidently this was not the purpose of Congress in authorizing unilateral set-off.[17]

We hold, therefore, that the limitation of § 16 (3) does not bar a reference to the Interstate Commerce Commission of questions raised by way of defense and within the Commission's primary jurisdiction, as were these questions relating to the applicable tariff.

III.

There remains the question of whether the Court of Claims properly dismissed the Government's defense of estoppel as to the respondents Bangor and Seaboard. We deal with it now because that defense would be reached should the further proceedings below, which must follow in consequence of what we have already said, result in

[16] See n. 2, *supra*.

[17] Statistics furnished by the Comptroller General show that since 1948 the General Accounting Office has post-audited 17,220,783 bills presented by carriers. In the same period post-audit revealed overpayment in 1,102,654 cases. The magnitude of these figures underscores the impossibility of requiring the Government to file anticipatory suits before the I. C. C. in every case where it thinks the carrier might later sue to recover the amount set off by the Government.

adherence to the view that Item 1820 applies to these shipments.[18]

The Government's claim is that the Bangor and Seaboard were estopped from charging the "1820" rate because of the Army's reliance on a ruling of the Official Classification Committee, a railroad tariff agency to which these two respondents belonged, that this type of napalm gel bomb shipment would be carried at a lower rate. The Court of Claims rejected this defense because (1) the ruling was later withdrawn by the Committee; (2) the Government had shown no detrimental reliance on the ruling; (3) it had paid the high rate billed for all shipments; and (4) neither carrier had acquiesced in the Committee's ruling.

We think that the Court of Claims erred in disposing of this defense by summary judgment. It appears to be undisputed that the ruling in question was not rescinded until *after* all of these shipments had been made.[19] The Government's affidavits in opposition to the motion for summary judgment were, in our opinion, sufficient to entitle it to an opportunity to prove reliance and detriment. The fact that the Government paid the carrier's bills as rendered is without significance in light of § 322 of the Transportation Act, *supra*, requiring payment "upon presentation" of such bills and postponing final settlement until audit. And the question whether the Official Classification Committee had authority to bind these two carriers to acceptance of a lower rate presents

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[18] The estoppel defense is not asserted against the Western Pacific, so that this case must in any event go to the Commission. Hence adjudication of the estoppel defense as to the Bangor and Seaboard would no doubt await the Commission's determination as to whether the "1820" tariff was applicable to these shipments, and reasonable if so applied.

[19] The ruling was made in 1943 and was confirmed in 1945. The Bangor and Seaboard shipments were made in 1944.

issues of fact which must be tried. Nor, unlike the case of a private shipper, do we think that the defense of estoppel is unavailable to the Government. See 49 U. S. C. § 22. Cf. *Oregon-Wash. R. Co.* v. *United States*, 255 U. S. 339; *Western Pac. R. Co.* v. *United States*, 255 U. S. 349.[20] We conclude that the Government should have an opportunity to prove estoppel, without any intimation, of course, as to whether it will be able to establish the defense.

The judgment below must be reversed and the case remanded to the Court of Claims for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS dissents from a reference of these matters to the Interstate Commerce Commission, since he is of the view that the principles of *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, are applicable here.

MR. JUSTICE REED and MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

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[20] A private shipper may not invoke the defense of estoppel to prevent a carrier from collecting a higher applicable tariff rate than that which may have been actually quoted by the carrier. This results from § 6 (7) of the Interstate Commerce Act, 24 Stat. 380, as amended, 49 U. S. C. § 6 (7), forbidding departures from the published tariff. See *Pittsburgh, Cincinnati, Chicago & St. Louis R. Co.* v. *Fink*, 250 U. S. 577, 583. The same considerations do not obtain when the Government is the shipper in view of § 22 of the Act, 24 Stat. 387, as amended, 49 U. S. C. § 22, providing that "nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States."